1982 Compilation of the Superintendent of Public Instruction's *Decisions and Orders*

Volume II

Legal Services Division
Office of Public Instruction
Ed Argenbright, Superintendent
State Capitol
Helena, Montana 59620

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INTRODUCTION

This is the second volume of Decisions and Orders of the State Superintendent of Public Instruction for the State of Montana. The Decisions and Orders are legal opinions, which set precedent in many school areas. We have provided an index that identifies the subject and topic matters, and the book provides the full text of each case.

This information is intended to assist school districts in dealing with school controversies that may arise, as well as to outline precedent setting rulings for the State of Montana. Volume I of the Decisions and Orders of the State Superintendent is also available from the Legal Services Department of the Office of Public Instruction.

We trust this information will be of assistance to school districts.

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BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

In the matter of the Transportation Appeal of EDWARD E. AHLQUIST, et al., Appellants, v. SCHOOL DISTRICT NO. 2; VIRGIL POORE, Superintendent of School District No. 2; THE SCHOOL BOARD OF SCHOOL DISTRICT NO. 2; MAURICE COLBERG, JR., Chairman of the School Board, Respondents.	DECISION AND ORDER OSPI 12-81

This is an appeal from a Decision and Order of the Yellowstone County Transportation Committee which affirmed the School District No. 2, Yellowstone, Montana; decision not to provide bus transportation for Appellants' children. The Yellowstone County Transportation Committee based its decision on "school law and the discretionary powers of the district to establish school bus routes within a 3-mile limit and to determine the eligibility of riders according to school policy."

Appellants are residents of Yellowstone County, Montana, and live within the exterior boundaries of School District No. 2 of Billings, Montana. Each of the Appellants is a parent and natural guardian of one or more children of school age who attend Arrowhead Elementary School, operated by and within said school district.

Appellants' children have been provided with bus transportation by School District No. 2, to and from Arrowhead School. The transportation service was provided at the beginning of the school year and the parents paid in advance for bus transportation for the first semester.

Appellants live on or near Rimrock Road, which is a state highway, located west of Billings. Several Appellants live on the south side of Rimrock Road while the remainder of the Appellants live on the north side of Rimrock Road.

On September 9, 1981, Appellants were notified by the school district that bus service would no longer be provided to their children beginning September 14, 1981. Appellants learned that busing was

being discontinued because they did not live in excess of one mile from Arrowhead School as required by the school district busing policy.

The school district busing policy allows busing for children: who do live in excess of one mile from Arrowhead School or if a safety hazard is present. Appellants requested that the school district evaluate and review the safety situation in the area. The school board designated a group of individuals to act as a safety committee for the school district. The safety committee completed a comprehensive study and returned the report to the Board of Trustees on September 17, 1981.

On September 22, 1981, Appellants attended a meeting of the Education Committee of the Board of Trustees to request reconsideration of the busing denial based on the safety issue. The school district's committee rejected such reconsideration.

Appellants appealed the Decision to the Yellowstone County Transportation Committee which held a hearing on the matter. Appellants claimed that the school district's decision to terminate busing should be set aside based on two reasons:

1. That busing transportation should be provided for the children that live on the south side of Rimrock Road because of a safety hazard.
2. That the remaining Appellants were entitled to bus service bacause their children, who lived on the north side of Rimrock Road, would be required to walk in excess of one mile to school, even though Appellants' houses were located less than one mile from school, and the board's decision thereby allegedly violated its own policy concerning busing and violated state law.

The Yellowstone County Transportation Committee conducted a hearing. At the conclusion of the hearing, the transportation committee rendered a decision and order in favor of the school district. It is from that decision that Appellants present this case.

This State Superintendent has adopted the standard of review as set forth in Section 2-4-704 MCA (Montana Administrative Procedures Act). The standards of review states:

(1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested. See also Yanzick v. School District No. 23, ___Mont.___ , ___39 St. Rptr.___ 191 (1982).

Appellants' argument rests upon the Board's alleged "arbitrary or capricious action or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Montana law provides that school districts are responsible for bus transportation to certain public school children. Section 20-10-100 et seq. MCA, (1981). Trustees may furnish transportation for "eligible transportees." If the trustees choose to furnish transportation to one "eligible transportee," they must furnish it to all "eligible transportees." An eligible transportee is defined as a public school pupil who "resides at least three miles, over the shortest practical route, from the nearest operating public school." Section 20-10-101(2), MCA.

Appellants reside within three miles of Arrowhead School. They do not qualify as "eligible transportees." Since they are not eligible transportees, then the school district may maintain a policy in determining which ineligible transportees have access to bus transportation.

The school board adopted a policy on school transportation. The policy states in part:

c. Transportation service is organized to provide: (a) that students in Grades K-6 may ride a school bus if living one or more miles from the school attended, or if a safety hazard is present as determined by the board or its designee...'

The school trustees have the discretionary power to decide whether or not to provide transportation. The school district's compliance with the statute is not contested. The contested issue is those children who are ineligible and who, within the discretion of the school board, may be afforded transportation. The Legislature did not restrict the trustees discretionary powers in providing or refusing to provide transportation. This discretionary power must be exercised reasonably, and not abused by arbitrary or capricious action. State ex rel. School District No. 29, Flathead County v. Cooney, 102 Mont. 521, 59 P.2d 48 (1939), Young v. Board of Trustees, 90 Mont. 576, 4 P.2d, 725 (1931).

Measuring Distances

Appellants claim that those children living north of Rimrock Road should be bused to Arrowhead Elementary School because they must walk more than one mile to reach the school.

Appellants claim that the trustees abused their discretion in the way they applied the policy to Appellants' children and the County Transportation Committee failed to reverse the decision. The question then becomes how are distances for transportation purposes measured under Montana law. The question of how to measure the one mile distance is raised by the fact that the children living north of Rimrock Road reside:

(a) less than one mile from Arrowhead School when that distance is measured along 38th Street and Rimrock Road, the normal driving route; but,

(b) More than one mile from Arrowhead School when that distance is measured by following the safe walking route designated by the trustees for these children.

Montana law is clear on the determination of mileage distances. The application of the law in this case resolves the first issue.

Section 20-10-106, MCA, determination of mileage distances states:

When the mileage distance that transportation services are to be provided is a matter of controversy and is an issue before a board of trustees, a county transportation committee, or the superintendent of public instruction, the mileage shall be established on the following basis:

(1) The distance in mileage shall be measured by a vehicle equipped with an accurate odometer.

(2) A representative of the applicable district and a parent or guardian of the child to be transported shall be present when the distance is measured.

(3) The measurement shall begin 6 yards from the family home and end 6 yards from the entrance of the school grounds closest to the route.

(4) The route traversed for the measurement shall be the route designated by the trustees, except that the route shall be reasonably passable during the entire school fiscal year by the vehicle that provides the child's transportation. In determining reasonable passage, a route may not be disqualified because it is impassable during temporary, extreme weather conditions such as rains, snow, or floods. (emphasis supplied)

Respondents contend that this measurement statute does not apply to the present case. I disagree. The question is one of distance as it applied to the policy. The statute requires that the route measured be the route "designated by the trustees." The Montana statutes do not specifically refer to walking distances. The statute speaks of residence distances, which, in the absence of a measurement statute could even be measured "as the crow flies." The measurement statute must be read in the context of the other transportation statutes. It specifically requires the measurement be made with a vehicle. It specifically requires that the measured route be "reasonably passable" for a vehicle. The "shortest practical route" is therefore clearly intended to be a vehicular route. In terms of measurement, the statute restricts the discretionary power of the trustees to determine distances. Transportation cases are not walking distances nor are they required to be so.

Safety Hazard

The second issue on appeal is whether the County Transportation Committee erred in not finding that the school district acted in an arbitrary and capricious manner in applying its safety hazard exception to this transportation case. The Billings school district is one of the largest school districts in the state. Geographically, and in terms of population, the questions of safety for all children are of considerable magnitude and must always be considered by the Billings

school district. The record indicates that the district has been requested by numerous individuals to provide bus transportation for their children on the basis of a safety hazard. The school district responded to these numerous requests by establishing a safety committee which reviews such requests and recommends a response to the trustees. The safety committee, made up of numerous individuals, investigates all requests for transportation based on safety hazards throughout the district.

From the record it appears that the safety committee is familiar with the variety of walking conditions faced by school children throughout the school district and has developed expertise and experience in comparing claimed hazards in one area with claimed hazards elsewhere in order to achieve a uniform application of the policy throughout the district. The school board of trustees is responsible for the health and safety of the children in their school district. They are permitted to employ and dismiss administrative staff and other personnel deemed necessary to carry out the various services of the district. Section 20-3-324, MCA. The trustees may choose to accept or reject the safety committee's recommendation. Here they chose to accept the recommendation.

The record is replete with testimony indicating that the safety committee carefully considered the claims made by the Appellants. For Appellants' children living north of Rimrock Road, the safety committee investigated and developed a safe walking route in the fall of 1980. For Appellants' children living south of Rimrock Road, the investigation was completed upon Appellants' request. The evidence presented at the county transportation committee hearing shows that in making its determination, the safety committee considered factors including: traffic density, geography, weather, conditions of roads, existence of shoulders on roads, and the existence of alternate walking routes, walking parts of it themselves, and driving along other parts. From the record, the safety committee compared the level of danger posed by the proposed safe walking paths to the level of danger found along other safe walking routes within the district, where bus transportation has previously been denied. The members of the safety committee judged that any hazard present was insufficient to justify bus transportation.

The safety committee recommended their findings to the board of trustees; a board composed of eight members selected from the community and by the community to govern the affairs of the district. Appellants were granted a hearing before the trustees. Appellants had the full opportunity to and did present facts of claimed safety hazards to the trustees. The report of the safety committee was also presented.

Once again the evidence was presented upon appeal by the Appellants to the County Transportation Committee. The County Transportation Committee was made up of the following individuals: Jim Straw, representing the Board of County Commissioners; Rita Reiser, representing School District No. 2; Bill Sorg, representing Laurel High School and Elementary District; Bud Vise, representing Broadview's High School and Elementary District; Jack Welch, representing Pioneer-Shepherd Elementary and High School District; Dennis Espeland, representing the elementary districts under the Billings High School District for School District No. 2, and the County Superintendent of Schools, Genevieve Bauer. A total of nine local individuals present in the Billings area. The County Transportation Committee had an opportunity to review all of the evidence presented to them. Appellants were represented by counsel and had an opportunity to present evidence and cross-examine witnesses at the hearing. This particular hearing afforded due process for all concerned and has been recognized by the Montana Supreme Court in Yanzick v. School Board to be the record upon which all appellate review shall occur. The Committee exercised its statutorily granted discretion and made a careful and considered decision that there was insufficient safety hazard to justify the provision of bus transportation.

An appeal of this nature involved approximately 20 people from the local school district area who had an opportunity to review the evidence and review the material presented to them by both parties. A safety committee was established to carefully evaluate the alleged safety hazard. The school board made up of local individuals of the community had an opportunity to make an independent evaluation after public hearing. Further, the County Transportation Committee had an opportunity to review once again and conduct a de novo hearing on the entire case. After hearing all of the evidence, including the facts

on the alleged safety hazard itself, the County Transportation Committee found no abuse of discretion. Appellants now request that an individual located 250 miles away from the local school district make a separate and independent evaluation of the evidence where approximately 20 individuals who were intensely involved in this case spent many hours taking in evidence and considering all facets of this case. The Montana Administrative Procedures Act and the Montana Supreme Court in the Yanzick decision clearly prohibit this state superintendent or any other court of review to substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. This state superintendent may affirm the decision or remand the case for further proceedings. I may not substitute my judgment for that of nearly 20 other people. Section 2-4-704, MCA.

Appellants in this case presented no competent evidence to support the finding to any committee that a safety hazard existed. Specifically, no traffic counts were given. No accident reports were analyzed. There was no comparison with other districts by the Appellants of potential problems. The school district did present an exhibit dealing with the matrix to be used in analyzing safety hazards for school children. It was not until Appellants presented their argument to the state superintendent that additional evidence was attempted to be introduced. None of the exhibits were offered into evidence at the Board's hearing or before the County Transportation Committee. None of the exhibits were allowed to be cross-examined or explained in detail. The Supreme Court in Yanzick disallows such additional evidence, especially evidence that may be questionable as to the relevancy, competency or potential hearsay. This additional evidence will not be accepted here.

I find, therefore, that the County Transportation Committee did not abuse its discretion in affirming the board of trustee's decision in denying transportation to Appellants in this case. The real issue, however, goes far beyond the scope of this administrative appeal or the power of this state superintendent. The solution that was requested by the Appellants is only one which in a short term, temporary fashion alleviates or minimizes the safety concern of parents for the entire district. The school district is not in the business of insuring safety of highways. They are in the business of educating child-

ren. The State Highway Department and the City of Billings are the authorities responsible to construct adequate bike paths, pedestrian paths, and take all reasonable and appropriate steps to insure safety not only for the children of Billings, but for all citizens of Billings. Since no evidence was presented at the hearing as to efforts that these entities are taking, I am bringing this matter to the attention of the appropriate officials who have first-hand knowledge, as do the other twenty members of this appeal process, of the problem. I am strongly recommending that this local problem be resolved in Billings by the people that are hired and assigned to take care of these problems. I shall work as an advocate on behalf of safety to insure that if a safety hazard exists in any part of Billings, a long-term permanent solution is found, rather than a short term busing solution.

Within a few weeks, the school district will let children out on spring days or during the summer. The children are still walking down this barrow pit which is alleged to be a safety hazard. They are still allegedly hidden from view and the possibility of an accident is still there. A temporary solution will not solve the problem. As a parent myself, I know that parents are ultimately responsible for the safety of their children and therefore are urged not to single out the school, but to find, through the appropriate planning staff of the highway department, a solution to this problem. I call the attention of Mr. Don Harriott, Chief Engineer of the Montana Highway Department, and Mr. Al Thelen, the Billings City Manager, to this problem. The city traffic engineer, Pierre Jomini, must also be an integral part of the solution to any safety hazard present here. I urge that the school district and the City of Billings commit themselves to a long-term solution to any alleged safety hazard which affects school children in that city. Insufficient evidence was presented in the County Transportation Committee level that would order a temporary busing solution. To allow the children the use of transportation would not provide the protection which is called for in this case. However, I am also concerned as to the safety of children in all areas of Arrowhead School and the school district as a whole. It is for those children whose parents are not as concerned about safety as Appellants in this case that I address my concern as well. In the long run, the

safety of the children involves 12 months of the year. That must be the goal established here.

I am making this office available as an ombudsman, or an advocate on behalf of the safety of all children in this area. I am prepared to assign our transportation specialists to work on this problem and to keep me updated as to the progress in this area. Much valuable time is being lost in the effort to correct the safety problems through further litigation over busing. The time and concern of both the parents and the local city engineers and the state highway department must be devoted to those who can construct the final, permanent solution. I affirm the County Transportation Committee's decision and request that all parties in this action take appropriate measure to insure the safety of their children and the entire school district of Billings.

DATED April, 1982.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

LOUIS KISLING, Appellant,	)	
v.	)	DECISION AND ORDER
SCHOOL DISTRICT NO. 2A(C), PHILLIPS COUNTY, MONTANA, Respondent.	)	OSPI 14-81

This is an appeal from the Findings of Fact, Conclusions of Law and Order rendered by the County Superintendent of Schools, Phillips County, Montana.

Louis Kisling, hereinafter referred to as the Appellant, was employed by School District No. 2A(C) Board of Trustees, Dodson, Montana, hereinafter referred to as Respondent, for twelve years. Appellant was an elementary classroom teacher and later a high school teacher and guidance counselor. Since 1974, Respondent became aware of problems with Appellant's performance as a teacher. During the school years 1979-80 and 1980-81, Appellant's performance problems became acute. On March 13, 1981, the District Superintendent recommended Appellant's contract for 1981-82 not be renewed. Notice of a hearing on the recommendation was sent to Appellant. On March 25, 1981 a hearing was held by the Respondent on the recommendation that Appellant's contract not be renewed. Respondent, through resolution, decided not to offer or renew Appellant's contract. Later, Appellant requested a statement of reasons for his nonrenewal. On April 7, 1981, Respondent provided the statement of reasons to Appellant.

On April 14, 1981, Appellant requested a hearing before Respondent. Appellant and Respondent stipulated that the issue would be taken directly to the county superintendent without another board hearing to avoid the delay of another hearing before Respondent on the same matter as the March 25, 1981 hearing. Later Appellant insisted that he did not waive his right to a second hearing and therefore requested another hearing before the board. On June 19, 1981, a second hearing before Respondent was held on the decision not to renew

Appellant's contract. On June 22, 1981, Respondent affirmed its decision not to renew Appellant's contract for the 1981-82 academic year. Appellant filed an appeal with the Phillip's County Superintendent of Schools pursuant to Section 20-3-107, MCA. The county superintendent held a hearing on September 23, 1981. Appellant and Respondent were represented by counsel. The county attorney advised and was accessible to the county superintendent during this hearing. Both parties had the opportunity to present and cross-examine witnesses and briefs were filed with proposed findings.

On December 1, 1981, the county superintendent entered Findings of Fact, Conclusions of Law and Order and affirmed the decision to terminate Appellant. It is from those Findings of Fact, Conclusions of Law and Order that Appellant presents this case.

Respondent listed the following reasons for nonrenewal of the contract:

1. Louis Kisling is unable to maintain classroom discipline resulting in the disruption of classes of other teachers, destruction of school property and an extremely poor learning environment in his classes.
2. Louis Kisling fails to adhere to school policies concerning student discipline, student dismissal times, student grading, study hall and library policies, absences from classrooms without notice to school administration, homework assignments and he generally exhibited an uncooperative and indifferent attitude concerning school administration directives.
3. Louis Kisling is without the ability to develop and foster adequate professional relationships with the other members of the faculty by reasons of his confrontations with other faculty members in the presence of students.
4. Louis Kisling failed to respond to numerous attempts by the school administration to help correct his performance problems over a period of several years and in intensive effort by Martin Dwyer during the first nine weeks of the 1980-81 school year.

Appellant contends the county superintendent erred in giving too little weight to Kisling's status as a tenured teacher. Recently, in

Yanzick v. School District No. 23, ___Mont.___, ___P.2d___, 39 St. Rptr. 191 (1982), the Montana Supreme Court mandated that the county superintendent follow the Montana Administrative Procedures Act in contested cases such as this school controversial appeal. The state superintendent, since the commencement of his administration and prior to the Yanzick decision, has followed the Montana Administrative Procedures Act. (See Sorlie v. School District No. 2, Simonsen v. School Board, Knudsen v. School Board, and Hiller v. School Board.)

Section 2-4-711(2), MCA, allows an Appellate Judicial Review body to reverse or modify the decision if substantial rights of the Appellant have been prejudiced because of the administrative findings, inferences, conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested.

The district court and the state superintendent may not substitute their judgment for that of the county superintendent as to the weight of evidence on questions of fact. The Supreme Court refers to the county superintendent appropriately as the lower appellate tribunal. This lends weight to the fact that the county superintendent's hearing process is crucial, perhaps the most crucial point in school controversial cases. The state superintendent, in turn, must base his conclusions on a review of the printed record, without the benefit of listening to and observing the demeanor, conduct and testimony of witnesses.

I may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings and conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

STATUS OF TENURED TEACHERS

I have previously recognized that tenure is a substantial, valuable and beneficial right. (See James C. Holter v. Valley County School District No. 13, Irene D. Sorlie v. School District No. 2, Yellowstone County and In the Matter of the Appeal of Board of Trustees of School District No. 9, Opheim, Montana, Decision and Order, November 19, 1981.) In the Opheim case, a nonrenewal of a tenured teacher's contract was before this state superintendent. There was insufficient evidence on the record and inadequate basis for the charges for nonrenewal of that teaching contract to overcome the substantial, valuable and beneficial right. Further, in that case I found that the hearing examiner's Findings of Fact, Conclusions of Law and Order was not acted upon arbitrarily or capriciously or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Further, vague allegations without specific facts that the teacher's program was not improving was not sufficiently documented as to allow this state superintendent, under the standard of review, to reverse the decision of the hearing examiner. In that opinion, I also addressed the concerns of the school board that a decision reversing their decision would effectively strip its power to operate its local school system. I disagreed. I maintained then, as I do here, that the local school district has an obligation to control the activities of its school and further, if a school board maintained proper actions and procedure against a tenured teacher as outlined in that case, with the application of the test promulgated in Yanzick, that the parameters and the correct process may be established in allowing a school board to select not to renew a tenured teacher's contract, and have that decision upheld.

THE YANZICK TEST

In Yanzick, the Supreme Court dealt with the nonrenewal of a contract of a tenured teacher. Among the issues decided by the Supreme Court was a standard of review to be applied by the county superintendent and other appellate ruling bodies including this state superintendent. Yanzick's contract was not renewed for the 1977-78 school year because the board of trustees, after a hearing, found that his living with a woman out-of-wedlock was common knowledge to his students, his discussion of abortion in the classroom, and his display

and use of human fetuses demonstrated his lack of fitness as a teacher. Numerous parental complaints, and the public knowledge of his living arrangement which was discussed in the classroom were all found to have a negative influence on the formation of moral judgments by his students. The Supreme Court recognized as well the ultimate power of the local board of trustees to govern the district, recognizing both the statutory and constitutional rights vested in the local board to supervise and control their schools, including the hiring and firing of teachers. The court quoted a Montana constitutional delegate in part:

> ...I feel, therefore, that we should give constitutional recognition and status to the local boards to--first of all, allay the fears which have been expressed, which I think are well-founded concerning the preservation of local autonomy...

Further, the Court in Yanzick citing Kelsey v. School District No. 25, 84 Mont. 453, 276 P.2d (1929) stated:

> A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote; and, presumably, are chosen by reason of their long standing in the community, sound judgment, and their interest in the educational development of the young generation which is so soon to take the place of the old.

Further, the Supreme Court said:

> In emphasizing that a teacher's work is a very sensitive area, and that school authorities have the duty to screen teachers as to their fitness to maintain the integrity of schools.

In Abler v. Board of Education, 342 USC 485 (1952), the United States Supreme Court said:

> A teacher works in a sensitive area in a classroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.

The court went on to hold that the standards of nonrenewal of a tenured teacher at the end of a contract is "good cause," and not the narrow standards described in Section 20-4-207, MCA.

BOARD'S RESPONSIBILITY TO FOLLOW THE LAW

An examination of the Findings of Fact made by the county superintendent in this case demonstrates the ability of the school board to follow the case law and proper procedure. The record indicates that the school board essentially did their homework as outlined by case law to establish good cause. Specifically:

1. The board set out not only to produce allegations, but to substantiate in detail, particulars through observation over an extended period of time as to the failure of a tenured teacher to maintain particular standards.
2. The teacher, in turn, was notified through several evaluations, had the ability to respond to the evaluations, and a period of time to seek assistance to re-establish his standard.
3. The board listed specific reasons for nonrenewal of teaching contracts.
4. The board provided appropriate procedures leading to Appellant's nonrenewal in establishing the process outlined by both the statute and the Yanzick decision.
5. The evidence produced at the hearing in support of the reasons given by the board was exhaustive, detailed, substantiated both by oral testimony, documentation, and personal observations of superiors.

The county superintendent exercised his responsibilities to hear and decide controversies and to make the decisions based upon the facts established at the hearing. The hearing was de novo before the county superintendent. Specific findings made extensively are in part, as follows:

> a) Inability or unwillingness to maintain classroom discipline as observed by Mr. Piippo, Superintendent in 1979-80, and Mr. Dwyer, Superintendent in 1980-81, and Mr. Huber, Mrs. Edmister and Mrs. Rapp, other teachers in the school during the same two academic years. The observation of Mr. Kisling and his classes by these people included: so much noise coming from Mr. Kisling's classroom or study hall that it would be necessary for other teachers

to close their classroom doors so their classes would not be disrupted; observing students in Mr. Kisling's classes pestering each other, reading novels, paperbacks, and magazines in class; writing personal letters and notes and passing them back and forth during class; many students talking at once, having private conversations; students leaving the classroom without permission before being dismissed; students throwing objects at other students, students being allowed to sit on desk tops and chair backs, and Mr. Kisling's failure to follow through on threats of discipline to the students for these activities during class.

b) Inability or unwillingness to adhere to school policies and procedures and administrative directives as observed by Mr. Ken Piippo and Mr. Martin Dwyer including his inability to control the defacing of school desks by students and damage to the backs of student desks resulting from students sitting on the desk backs after receiving repeated instructions from Mr. Piippo and Mr. Dwyer to control the situation; inability and apparent unwillingness to enforce the library policy concerning the number of students in the library at one time and the policy on student sign-outs from the study hall. In this respect, Mr. Kisling testified that, contrary to school policy as set forth in the teachers handbook, he did not feel that he had to accept responsibility for the number of students in the library during his study hall periods. Mr. Kisling also failed to come to a school Christmas program of only one hour duration when specifically instructed to come and which was attended by all other teachers and was an important program for school-community relations. Mr. Kisling was frequently absent from his classroom and study halls during class periods leaving his class unattended by his own admission--in violation of the school policies as set forth in the teachers handbook. Mr. Kisling failed to follow the school "pink slip system" for student discipline.

c) His inability to develop and foster adequate professional relationships with the other faculty members as evidenced by his making disparaging remarks about other teachers in front of the students--referring to Mr. Huber as a tattletale, referring to Mr. Robinson as incompetent, expressing his unwillingness to supervise the library to Mr. Dwyer--all in the presence of students; by acting as an advocate for students in disciplinary situations including a note-writing incident involving Mrs. Edmister, and a refusal of a student to respond to instructions from a teacher involving Mr. Robinson; making disparaging remarks to Mrs. Rapp in study hall where some of his students were causing disruption. Mr. Kisling's attitude in student disciplinary matters as evidenced by the testimony including his own was that the student was presumed to have done nothing wrong, and teacher involved was at fault in the incident. He would apologize "for having to put" the student "through this" etc. Elementary classroom teachers would not consent to Mr. Kisling talking to their students about careers because every time something like that had been tried with Mr. Kisling, it would take the teachers the remainder of the day to get the classes back under control again.

Further, the county superintendent held that the incidences of Appellant's inadequate performance were not isolated, but were chronic, gradually worsening problems over a number of years which became intolerable during the 1979-80 and 1980-81 academic years. The school administration quite properly and meticulously made a concerted effort during the 1979-80 and 1981-82 school year to assist Appellant in correcting his performance problems, including evaluations, informal discussions and a written itemization at the end of the 1979-80 academic year of deficiencies in Appellant's performance. Appellant verbally agreed to make the necessary changes in his job performance but was unwilling or unable to follow through with these changes.

The county superintendent also addressed the concern of Yanzick and other decisions of the effectiveness of teaching in the classroom. The ultimate test in many of these decisions is the effect the performance or non-performance of a teacher has upon the students in this state. In that capacity, the county superintendent found that:

> In order to provide the proper learning environment for students in the classroom setting, it is essential that the attention of students be maintained, which requires discipline in the classroom and respect for the teachers by the students.

Mr. Kisling was unable to maintain classroom discipline as noted above and did not have the respect of his students as evidenced by their disregard for him in the classroom and disparaging remarks they made inside and outside the classroom.

> In order for the school as a whole to properly serve the students enrolled, the faculty and staff must be able to work together as a cohesive unit to maintain the proper learning environment. Discipline problems in one class cannot be allowed to affect other classes. School policy must be uniformly applied to all students by all faculty members. One faculty member undermining disciplinary activities of another faculty member cannot be tolerated. All faculty members must show respect for one another and disparaging remarks about one faculty member by another in front of students cannot be condoned or tolerated as the result would be complete disruption of the educational environment and destruction of the student-teacher relationship. (Findings of Fact, Conclusions of Law and Order.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Conclusion reached by the county superintendent that the nonrenewal of Appellant's contract as a teacher in School District No.

2A(C), Dodson, Montana by the board of trustees is proper as the same is based upon reasons directly related to Appellant's refusal or inability to perform the services for which he was hired in a competent and professional manner, and the reasons given him for his nonrenewal are supported by substantial credible evidence. From the facts presented by this case, the Respondent had ample evidence upon which to base its decision not to renew Appellant's contract. The county superintendent has more than sufficient evidence in the record to justify her conclusion of affirming the Respondent's action. There was abundant testimony of Appellant's problem of discipline as described by several individuals. Appellant's inability or unwillingness to adhere to school district policies, procedures and administrative directives was also described by several individuals. Appellant's failure and inability to foster and develop adequate professional relationships with other staff members occurred on several occasions, and he did not deny such instances; his inadequate performance was not an isolated incident, but was chronic and gradually worsening over the years. Such proportions the county superintendent found, and I affirm, is good cause established by case law. The record is clear that the administration made a concerted effort during the 1979-80 and 1980-81 school years to assist Appellant in correcting his performance problems, including formal evaluations and informal discussion in a written itemization appended to this contract at the end of the 1979-80 academic year. It is generally not one isolated act which provides the justification of nonrenewal of a contract of a tenured teacher, but usually a series of problems of increasing severity over a period of time. (State ex rel. Cochrane v. Peterson, 294 N.W. 203 (1940), Conder v. Board of Directors of Windsor School, 567 S.W. 2d 377.) The problem that the Dodson school system experienced with Appellant as it is clear from the record is the same as problems experienced in cases in other states. As the record indicates, there were many instances where Appellant's inability to maintain classroom discipline, his inability to get along with his fellow teachers, and his failure to carry through administrative directives created and substantiated good cause for the Respondent's decision not to renew his contract. The conclusions the county superintendent reached on the evidence in total shall not be disturbed.

SCHOOL ADMINISTRATION'S RESPONSIBILITY TO INSURE COMPETENCY OF TEACHING

The county superintendent made specific findings that no evidence of intent to wrongfully deprive Appellant of his position was offered other than Appellant's own personal feelings. All teachers in the system were frequently visited by the school superintendent.

The responsibility of the school administration as agents for the school board is to assist teachers in their professional development. School administrators also have a duty and a responsibility to insure competency in the classroom. Evidence indicated in this case that the superintendents for a span of several years attempted to identify specific problems, evaluate those problems, recommend alternative courses, and assist in the effectiveness of teaching, ultimately to the benefit of the students in the classroom. The attention given to a teacher in this case provides a good example of an attempt to correct a problem in a proper manner. The administration as well as the teacher knew at all times what his status was, what his performance evaluation was, and what was needed to correct the performance evaluation. The teacher was aware that evaluation was continuous and occurring without surprise. Further, findings made indicated that other teachers were also frequently visited by the superintendent. Ultimate responsibility of insuring that professional development continues lies both with the board and school administrators. A consistent, up-front approach through written evaluation and response is ultimately the final answer as to whether a teacher may succeed to improve his/her teaching abilities in the classroom. In this case, the teacher failed. Affirmed.

DATED April 6, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

ROBERT JONES, Appellant, v. RAVALLI COUNTY SCHOOL DISTRICT NO. 15-6, Respondent.	)	DECISION AND ORDER OSPI 19-82

This is an appeal by Robert Jones, Appellant, from the final order of the Acting Ravalli County Superintendent of Schools, affirming the decision of the Board of Trustees of Ravalli County School District #15-6 not to renew Appellant's teaching contract for 1980-81, and affirming the adequacy of the reasons given for the termination.

The findings of fact and record reveal that Appellant was employed by the Florence/Carlton School District during the school year 1979-1980. Appellant is a non-tenured teacher.

On April 8, 1980, Appellant was orally notified by the District Superintendent that he was recommending to the Board of Trustees that Appellant not be offered a teaching contract for the 1980-81 school year.

On April 8, 1980, the District Superintendent also submitted, in writing, to the Appellant, a letter confirming the oral notice and outlined specific areas for future professional growth. These areas included:

(1) working and communicating effectively with parents, and

(2) his teaching approaches and expectations for student's work, their interests and needs.

On April 14, 1980, the Board of Trustees formally notified the Appellant that his services would not be renewed at the end of the 1979-80 school year.

On April 21, 1980 Appellant requested reasons for the dismissal by the school board, pursuant to Section 20-4-206(3) MCA. The Board of Trustees provided Appellant with the reason for nonrenewal as "it is believed the district can hire a better teacher."

Appellant had been advised in his first evaluation, in the school year 1978-79, of criticism for having sent out a large number of poor work slips; and criticism by the district superintendent of the high number of below-average grades given by the Appellant to his students during the 1979-80 school year. Appellant acknowledged that an excessive number of below-average grades would indicate poor teaching, but denied that the grades given by him to his students indicated more than the ordinary below-average grades as are given on the standard grade curve. The County Superintendent also found that the transcripts of the classes taught by the Appellant during the school year 1979-80 disclosed that in three of the five classes, taught by the Appellant, nearly one-half to more than one-half of the students in these classes received failing or below-average grades, and in only one of the five classes was the number below-average less than 25% of the enrollment.

On June 5, 1981, Appellant filed a Petition for Judicial Review in the District Court of the Fourth Judicial District. Appellant filed this action directly from the decision of the Board of Trustees of District #15-6 without exhausting his administrative remedies. See Section 20-3-210 and Section 202-107 MCA.

The Board of Trustees filed a Motion for Summary Judgment on the grounds that Appellant had failed to exhaust the remedies provided by school law. The Court concluded that as a matter of law, Appellant was not entitled to have his cause heard in the District Court until he had exhausted the remedies as set forth by the legislature for proceedings of this nature. Defendant's Motion for Summary Judgment was granted.

Following the Court order, Appellant appealed the Board of Trustee decision to the Ravalli County Superintendent of Schools. Appellant raised the following issues:

1. Whether the reason given by the school district that they "believed the district can hire a better teacher" is adequate compliance with Section 20-4-206(3) Montana Codes Annotated.
2. Whether the termination of Appellant by the school board was proper.

The County Superintendent permitted a formal hearing on the issues raised in the appeal and produced a transcript of the hearing which was made available to this State Superintendent and is made a part of the record. Section 2-4-704 MCA. Because the issue of whether a non-tenured teacher was entitled to a hearing pursuant to Sections 20-3-210 and Section 2-4-102 et seq. MCA, has not been raised here, this Superintendent will not address that issue here.

The County Superintendent concluded that: The termination of employment of Appellant was proper; a notice of termination was timely; Appellant made timely application for reasons for termination of employment; and the Board of Trustees made timely and proper response to the request for reasons. (See finding of facts, conclusions of law).

The County Superintendent also found that the reason given by the Board of Trustees as "it is believed the district can hire a better teacher", together with the additional reasons provided by the district superintendent to the Appellant as reasons for his non-recommendation, are an adequate specification of reasons as required under Section 20-4-206(3) MCA. Further, the County Superintendent concluded Appellant rights as a non-tenured teacher is not contingent upon "just cause."

This State Superintendent has followed the Montana Administrative Procedures Act in all school controversy appeals made to him pursuant to Section 20-3-107 MCA.

Section 2-4-704(2) MCA, allows an Appellate judicial review body to reverse or modify the decision if substantial rights of the Appellant have been prejudiced, because the administrative findings, inferences, conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested.

The Montana Administrative Procedures Act clearly mandates that this State Superintendent or any District Court not substitute their judgment for that of the County Superintendent as to the weight of evidence on questions of fact. Further, the Montana Supreme Court has said that the burden is substantial on an appealing party to show an agency's decision had substantially prejudiced the rights of the Appellant. See N. Plains Resource Council v. Board of Natural Resources and Conservation, ___Mont.___, 594 P.2d 297 (1979). The Montana Supreme Court refers to the County Superintendent appropriately as the lower Appellate tribunal. See Yanzick v. School District #23, ___Mont.___, 641 P.2d 431, 39 St. Rptr. 191 (1982). This Superintendent must base his Decision on a review of the record, without the benefit of listening to and observing the demeanor, conduct and testimony of witnesses. This Superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings and conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

Appellant raises identical issues before this Superintendent as were raised before the County Superintendent with regard to the reasons provided by the school district and compliance with Section 20-4-206 MCA. It appears that Appellant is contesting the conclusions of law rendered by the County Superintendent as to sufficiency of reasons. Appellant also raises issues of: whether it was an error for the County Superintendent to consider additional reasons presented by the school district at this hearing; whether the district superintendent evaluation was proper; and whether the County Superintendent ignored several Supreme Court decisions with regard to the termination of an employee's contract.

Recently, the Montana Supreme Court has rendered significant decisions with regard to the role of Boards of Trustees and the contract-employee rights of teachers in Montana. In Yanzick, supra, the Supreme Court dealt with the nonrenewal of a contract of a tenured teacher. Among the issues decided by the Court was that the standard of review of the Montana Administrative Procedures Act would be applied to the County Superintendent. More significantly, however, the Court further recognized the ultimate power of the local Board of

Trustees to govern the school districts, recognizing both the statutory and the constitutional rights vested in the local boards to supervise, manage and control their school, including the hiring and firing of teachers. The Court, in emphasizing the Constitutional nature of the local school board, quoted a Montana constitutional delegate in part:

> ...I feel, therefore, that we should give constitutional recognition and status to the local boards to--first of all to allay the fears which have been expressed, which I think are well founded concerning the preservation of local autonomy...

Further, the court in Yanzick citing Kelsey v. School District #25, 84 Mont. 453, 276 P.2d, 26 (1929) stated:

> A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote, and, presumably, are chosen of reason of their long standing in the community, sound judgment, and their interests in the educational development of the young generation which is so soon to take the place of the old.

Further, the Supreme Court stated:

> In emphasizing that teachers work in a very sensitive area, and that school authorities have the duty to screen teachers as to their fitness to maintain the integrity of school.

This quotation from Abler v. Board of Education 342 US 485 (1952) was relied on by the Court:

> A teacher works in a sensitive area in a classroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. Yanzick, p. 201, 202, 203.

It is important to note that the court determined that a finding of "just cause" was necessary for the non-renewal of a tenured teacher pursuant to Section 20-4-204. However, the decision in Yanzick, defined the broad discretionary power left with the local school boards, with the constitutional references.

Montana Constitution, Article X, Section 8, provides:

> The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law. (emphasis supplied)

The Court in Yanzick affirmed the decision of the school district and terminated a competent and well versed tenured teacher. See findings of facts detailed in Yanzick, p. 202, 201, 203.

The legislature has indicated its desire to place local control of schools in the local school districts, especially control of teachers. The Courts have continually recognized that control and affirmed their decisions. School District #12, Phillips County v. Hughes, 170 Mont. 267, 272-273, 552 P.2d, 328, 331 (1976). School District #4 v. Kohlberg, 169 Mont. 368 (1969), Yanzick.

The general broad powers of the trustees of the school district to hire and fire teachers is set forth in Section 20-3-324, MCA. The statute states in part:

> ...the trustees of each district shall have the power and it shall be their duty to perform the following duties or acts:
>
> (1) employ or dismiss a teacher, principal, or other assistant upon the recommendation of the district superintendent, the high school principal, or other principal as the board may deem necessary, accepting or rejecting such recommendation as the trustees shall in their sole discretion determine, in accordance with the provisions of the school personnel part of this title.
>
> ...in accordance with the provisions of Title 20, Chapter 4. Section 20-3-324, MCA.

Also of significance is the recent Montana Supreme Court decision in B.M., a minor, by Leona M. Burger, her guardian Ad litem v. State of Montana, et.al. ___Mont.___, _____P.2d_____, St. Rprt. (1982). The Court placed an additional concern, tort liability, on boards of trustees in their capacity to administer schools. The importance of the decision in B.M. again is wide ranging, in that the

Court had discussed public policy and the duties and responsibilities of school authorities and school boards to ensure that students in this state receive appropriate education and placed direct responsibility on boards of trustees to maintain an educational standard of care.

The boards of trustees sit in a fiduciary capacity. They hold the helm of each school district, establishing and developing not only a competent system but more importantly the best educational system that public money can provide. They oversee the budgets and the public financing of schools on the local level and they maintain the ultimate decision on hiring and firing of teachers. They are directly accountable to the parents and students of a school system if sound education is not provided. They are also responsible to ensure that the educational school system does not meddle in mediocrity in just getting along, but does strive to achieve and seek excellent standards in teaching and preparing our youngsters as future adults of this state. The ultimate result of this duty and responsibility is to ensure that our youngsters are receiving the best education public money can buy and at the same time afford those well competent and accepted teachers in the school system privileges of tenure.

Appellant argues cases like Cookson v. Lewistown School District #22, 351 F.Supp. 983 (D.Mont. 1972) have no application in the determination of whether the reason provided by this particular school district is sufficient and legally proper under the standards of review of the Montana Administrative Procedures Act. Appellant argues that these cases were decided in 1972 and since that time, there have been changes in rights, interests and status of non-tenured teachers.

A brief history of the status of non-tenured teacher cases and law in Montana is in order.

The clearest statement of the board's right to weed out all but the best teachers was made by a federal district court in Montana. In upholding a non-reappointment that the school board justifies on the basis that only average teaching could be expected from the teacher, the court said:

> It is quite clear that Montana has adopted an employment policy... which frees a school board from any tenure problems during the first three years of a teacher's employment. These

> three years are the testing years during which not only may the teacher's merits be weighed, but the school's needs for a particular teacher assessed... (I)In the interests of creating a superior teaching staff a school board should be free during a testing period to let a teacher's contract expire without a hearing, without any cause personal to the teacher, and for no reason other than that the board rightly or wrongly believes that ultimately it may be able to hire a better teacher. Cookson, p. 984-986.

In Cookson, the Federal Court determined that at that time the laws of Montana permitted a school district to terminate the services of a non-tenured teacher without reason.

By 1975, (Mont. Laws ch. 142) the Legislature amended what was then RCM 1947 Section 75-6505.1 (now Section 20-4-206(3) MCA) and required that the school district, if requested to do so, give the reasons for a failure to renew a non-tenured teacher.

Section 20-4-206(3), M.C.A. provides:

> When the Trustees notify a nontenured teacher of termination, the teacher may, within 10 days after receipt of such notice, make written request to the trustees for a statement in writing of the reasons for termination of employment. Within 10 days after receipt of the request, the trustees shall furnish such statement to the teacher.

An extensive review of the minutes of the Senate Education Committee of 1975 reveals some insight as to the intent of the amendment. The intent of the bill was to provide schools with direction of supervision for all teachers and not simply tenured teachers. Further, the legislature comments recorded, revealed that the "teachers should be given rationale." March 7, 1975, Senate Committee on Education minutes.

The legislature did not express that a non-tenured teacher was provided with a new substantive property interest or any right now enjoyed by a tenured teacher. The discretionary powers of the Board of Trustees and the local control were not altered.

This position was affirmed in apparently the sole administrative consideration of such a case in a case entitled In the Matter of the Appeal of Evelyn J. Keosaian. Decision and Order rendered June 4,

1976 by Superintendent Dolores Colburg. Both parties have cited this case as authority for their respective position.

In Keosaian, the State Superintendent narrowed the issues in the case to one. Whether the reason "we can find a better teacher" was a reason allowed by Section 75-6105.1 RCM (1947) now Section 20-4-206 MCA. Although my predecessor found that the reason does not comport with the intent of the statute, she did affirm the decision of the board to terminate and upheld the validity of the termination. She went on to say:

> "The foregoing does not change the fact that Ms. Keosaian's employment with the district will terminate at the end of her present contract since a statement of reasons is not a prerequisite to a valid termination."

The appeal was returned to the County Superintendent with instruction to order the Board of Trustees of School District No. 44, Flathead County, to give Ms. Keosaian a statement in writing of the reason or reasons for the termination of her services. One other significant statement made by Superintendent Colburg was that she accepted that the Board's belief that they could have a better teacher was true. The case was not appealed and Mrs. Keosaian was terminated.

The Board's ability to not renew was reaffirmed five years later by Branch v. School Dist. No. 7, 432 F.Supp. 608 (D. Montana 1977). There, another board said that it refused to reappoint a non-tenured teacher because it "could hire a better teacher to complement the system." The teacher claimed that retaliation for her criticism was the real reason for the non-reappointment. In upholding the board the court noted that "the problem posed here is not whether there was good cause for not renewing the plaintiff's contract but whether it was not renewed for some impermissible cause." Branch p. 610. In the court's opinion, the plaintiff was "an able and effective teacher," but the court refused to substitute its judgment for the school board's. It was the board's prerogative, the court said, to select the type of teachers it wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason and that the Board believed the reason to be true.

The court further illustrated in Branch that even though an interpretation was not requested, that the tenure laws provided more protections for the teacher requiring "explicit and clear reasons be given in writing." See Branch p. 610, footnote 5. It is well to repeat the in the cases of Yanzick and Branch, competent teachers were terminated. Both the Montana Supreme Court and the Federal District Court were not impressed nor did they find relevant the fact of satisfactory competency or good standing in terms of a teacher's ability. It was the board's prerogative, the courts have said, to select the type of teachers they wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason." In the case before us we find that the Board provided a reason. It was not constitutionally impermissible. They believed it to be true and their discretion has not been altered. (see transcript and record).

Other Federal District Courts have affirmed the boards' right not to reappoint a non-tenured teacher in order to strengthen the staff or to obtain a better teacher. See Powers v. Mancos School District, RE-6, 391 F.Supp. 322 (D. Colo. 1975), aff'd, 539 F.2d 28, (10th Cir. 1976), Phillippe v. Clinton-Prairied School Corp., 394 F.Supp. 316 (S.D. Ind. 1975), Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

Not everyone satisfies the prerequisite qualifications necessary to be granted tenure in a particular school district. Tenure is a privilege extended by the local school boards who is vested with the power from the community and responsible for the education.

Although a board may refuse to keep a competent teacher in order to seek a better one, it may not use the explanation to cover up a nonrenewal for a constitutionally impermissible reason. See Branch, Cookson, Keosaian, Roth v. Board of Regents, 408 U.S. 564 (1972). A Board may not refuse to renew a contract when the real reason for nonrenewal is the teacher's race, sex, national origin, or religion or desire to rid a teacher who has criticized the school's administration. Such protections from the First Amendment and other rights from the Constitution clearly cannot be the grounds or the basis for nonrenewal of a nontenured teacher. Appellant has not claimed any constitutionally impermissible reason as found in Roth and Keosaian and the record reveals no such evidence.

Non-tenured teachers do not have a vested property interest in the position. The non-tenured teacher is employed on a one-year basis. Their relationship is defined by a one-year contract. See Section 20-4-201. There are no entitlements to automatic renewal. To allow more will substantially weaken the tenured rights of those deserving teachers who are tenured with the district. This Superintendent has recognized the importance of those tenured rights and cannot allow such an indirect challenge on tenure to weaken the integrity of tenure laws. See Kisling v. School Board, OSPI #14-81, Decision and Order, Knudson v. School Board, OSPI 6-81, Decision and Order, Sorlie v. School District, OSPI #10-81, Decision and Order, affirmed 13th Judicial District Court, September 18, 1982. Whether a non-tenured teacher has interests requiring more procedural due process in a dismissal under contract is not presented to this Superintendent and will not be addressed.

Appellant has been granted more notification rights required by the legislature. He has received oral notification by the District Superintendent. Appellant received a letter confirming the oral notice of recommendation of non-renewal. He has been given reasons above and beyond those submitted by the trustees by the Superintendent. The District Superintendent is the executive officer of the Trustees and is completely subject to the direction and control of the Board of Trustees. See Section 20-4-402 MCA. The duties of providing additional reasons as part of his ministerial function to a non-tenured teacher are permitted by law. See Section 20-4-402 (8), School District #4 Lincoln County v. Colburg, 169 Mont. 368, 547 P.2d 84 (1974). Further, Appellant was provided a full evidentiary hearing with substantial evidence presented that supported the board's non-renewal because of the excessive number of poor grades issued, indication of poor teaching and continued criticism received from parents and concerned taxpayers. At no time was reference made to any subject other than his performance as a teacher. (See Yanzick, also Findings of Facts, Conclusions of Law dated March 19, 1982 as well as extensive transcript and testimony from Appellant and District Superintendent Willavize.) Appellant has received more procedural due process as a non-tenured teacher than several tenured teacher cases that have been appealed to this Superintendent.

Finally, the Appellant relies on two cases not relevant here: Nye v. Dept. of Livestock, ___Mont.___, ___P.2d___, 39 St. Rptr. 49 (1982), and Gates v. Life of Montana Insurance Company, ___Mont.___, ___P.2d___, 39 St. Rptr. 16 (1982). I will address both cases.

Nye involved an employee at will. Appellant here was not an employee at will but was employed for a specified term, under a contract which term ended with the close of the school year, and must be rehired by contract before he would again be an employee of the school district.

Re-employment here could be effected by notification by the Board of Trustees by April 15th of their intent to rehire the teacher for the following school year or by withholding notification of their intent not to rehire the teacher for the ensuing school year by that date. See Section 20-4-206 MCA. This case is not one of dismissal for cause, under contract. See Section 20-4-207 MCA. It is a case of non-renewal.

Appellant cites Gates as controlling. Gates involved the employment at will of an individual. Thereafter, the employer established procedural rules of personnel policy with regard to termination. The Court recognized that the company was not obligated to create these procedural rules, but having done so was obligated to follow its own policies in termination or otherwise there was a breach of good faith and fair dealing. Here the Board did not hire Appellant at will but under a one-year contract for each of the two years of his employment, with a specified termination date. Also there was no testimony provided as to any procedural rules adopted by the Board nor any violation of those rules. In fact it would be improper for a school district to adopt procedural rules which would be contrary to Section 20-3-324 (1), MCA.

AFFIRMED.

DATED October 15, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

ATTIE BLEVINS, Appellant, v. DANIELS COUNTY SCHOOL DISTRICT NO. 1, Respondent.	)	DECISION AND ORDER OSPI 20-82

This is an appeal from a decision of the Daniels County Superintendent of Schools made by hearing officer Harry L. Axtmann for the Daniels County Superintendent, rendered March 26, 1982.

It arises from a set of stipulated facts surrounding Ms. Blevins' decision not to teach her class on December 21 and 22, 1981. It was stipulated by the parties that Ms. Blevins requested paid personal leave for those days but that her request was denied in writing by the District Superintendent.

The collective bargaining agreement between the School District and the Teacher's Association states:

> "Two days will be granted per year, non-cumulative. The first day will be at full pay and the second day the teacher will be paid the difference between his daily wage and daily rate of substitute pay. The date of leave shall be approved by the Superintendent. Except in unusual circumstances, this leave will not be allowed preceding or following a major school event or vacation period."

On December 17th, the District Superintendent wrote an additional letter to Ms. Blevins urging her to change her mind and not to take leave on December 21 and 22, 1981. Ms. Blevins appealed the matter on December 19, 1981, to the school board and was absent from her job on December 21 and 22, 1981.

As a result of this action, the District Superintendent recommended termination of Ms. Blevins from employment, and the board decided to suspend her from her teaching duties without pay for a two-week period beginning January 5, 1982.

The matter was appealed to the County Superintendent who upheld the right of the board to punish Ms. Blevins under Section 20-4-207, MCA.

This matter is governed by the Montana Administrative Procedures Act as set forth in 2-4-704, MCA.

That statute sets forth the following standard of review:

> "(1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs. (2) The court may not substitute its judgment for evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, or
> (g) because findings of fact, upon issues essential to the decision were not made although requested."

There is no dispute between the parties as to the factual allegations as to what occurred, only a legal dispute as to the authority and the harshness of the discipline imposed.

The State Superintendent has recently issued an order concerning the legal basis for discipline short of termination in the appeal of Noel Furlong dated April 13, 1982.

There, as specifically held that a school board may discipline under 20-4-207 for an intentional violation of board policy.

The discipline in Furlong was not upheld because there was a failure to find an intentional violation of board policy.

Here the factual background indicates otherwise:

1. The policy is very precise.
2. Ms. Blevins was given a definite decision and the decision was reaffirmed by the Superintendent on at least one occa-

sion. Despite clear policy and firm decision by the Superintendent the appellant chose to violate that policy. No emergency reasons were given prior to the date of Ms. Blevins' absence.

This clear policy and clear intentional, willful violation by the teacher in this case, distinguishes it from the Furlong matter and requires that the decision of the County Superintendent be affirmed.

DATED August 16, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

****

NOEL D. FURLONG, Appellant,	)	DECISION AND ORDER
v.	)	OSPI 13-81
SCHOOL DISTRICT NO. 5, Respondent.	)	

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This is an appeal from a decision of the Flathead County Superintendent of Schools rendered November 20, 1981. The Appellant, Noel D. Furlong, timely appealed this matter. Briefs were filed and oral argument was heard on April 5, 1982 before me. The matter was deemed submitted at that time and I now render my decision.

I have adopted the standard of review set forth in Section 2-4-704, MCA, as a standard of review which I will apply to decisions of County Superintendents. That statute provides:

> (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (g) because findings of fact, upon issues essential to the decision, were not made although requested. (emphasis supplied)

Factually Mr. Furlong's dispute with the school district arises out of a trip which he took with the approval of the School District to Denver, Colorado in March, 1981. The dispute centers around the travel claim submitted by the Appellant on April 23, 1981 and its compliance or non-compliance with certain board policies concerning travel reimbursement.

After an extensive hearing before the Board of Trustees the Appellant was ordered to make reimbursement to the School District, lost his department chairmanship, and had restrictions placed upon his ability to travel at District expense.

That decision was appealed to the County Superintendent who made, among others, this conclusion of law:

> 3. Noel Furlong intentionally or unintentionally violated the policy of the Board of Trustees in submitting a claim for expenses which he did not incur. (emphasis supplied)

Section 20-4-207, MCA, provides for dismissals of teachers under contract. It provides that "the trustees of any district may dismiss a teacher before the expiration of employment contract for immorality, unfitness, incompetence, or violation of the adopted policies of such trustees." The record in this matter clearly reflects that the violation of a board policy is the only basis for the imposition of discipline under Section 20-4-207, MCA.

While the statute is not entirely clear, I do hold that lesser forms of discipline than dismissal may be imposed upon a finding of "immorality, unfitness, incompetence, or violation of the adopted policies of such trustees."

While the School District did find such a violation, the above conclusion of law by the County Superintendent is inadequate to permit any discipline whatsoever under Section 20-4-207, MCA.

Section 20-3-324, MCA does not provide the Board of Trustees with an additional weapon to discipline employees including tenured teachers. It was legal error for the County Superintendent of Schools to partially base his decision upon that statute.

While I therefore must reverse the decision of the Flathead County Superintendent of Schools, I must note for the record that County Superintendent's "Rationale for Decision" attached to his

Decision and Order does for the most part describe accurately something that both parties to this appeal could have worked out much earlier, easier, and with much less effort had they behaved in a more mature fashion. School controversies, I am sure, were intended to exclude matters such as this one. I hope that in the future both parties will learn to approach a misunderstanding with a little more reason and a lot less confrontation.

The decision of the Flathead County Superintendent of Schools is reversed, except insofar as the $145.00 which all parties agree should have been and has been repaid by the Appellant to the School District.

DATED April 13, 1982.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

DAWN HANSON, Appellant,	)	
	)	DECISION AND ORDER
v.	)	
	)	OSPI 21-82
SCOBEY SCHOOL DISTRICT NO. 1, Respondent.	)	

This is an appeal by tenured teacher Dawn Hanson (hereinafter referred to as Appellant) from the Findings of Fact, Conclusions of Law and Order rendered by the Hearing Officer sitting in place of the Daniels County Superintendent of Schools regarding the dismissal under contract of a tenured teacher for violation of explicit and specific School Board directives.

From the record, as defined in Section 2-4-614 MCA, and the Uniform Rules of School Controversy it appears that Appellant had been a teacher in the Scobey School District for over eleven years. On November 9, 1981 Appellant applied for twelve (12) days of personal leave to visit her daughter. This leave period extended from December 21 through January 15, 1982, excluding such days as are permitted for appropriate holiday vacation.

The collective bargaining agreement which Appellant has been a part of provides for only two (2) days of personal leave and for such leave not to be granted immediately preceding or following a vacation period. Because the requested leave fell immediately before and after Christmas vacation, Appellant changed her request to that of a general leave status.

According to the collective bargaining agreement, general leave status shall be granted at the sole discretion of the School District.

On November 23, 1981, Appellant met with the School Board of Trustees and the School Superintendent. The School Superintendent denied the request for the requested leave. The School Board unanimously approved the School Superintendent's decision and disapproved the request for general leave of Appellant. One of the several factors influencing the School Board's decision not to allow the requested leave was because the School Board felt that the loss of a

normal instructor for 12 days out of 180 teaching days or about 7% of the students' school year would not be appropriate leave, and would be detrimental to the students' education.

On December 16, 1981, Appellant sent a letter to the Superintendent and to the members of the Board of Trustees stating that she was disobeying their denial of her request for general leave and that she would take the requested days without their approval. On December 17, 1981, the School Superintendent wrote Appellant a letter warning her of the consequences of her decision advising Appellant of her rights and notifying Appellant of the date on which recommendation of termination would be made to the School Board if she chose to take the unprivileged and ungranted leave of absence. The Superintendent requested Appellant to reconsider her decision and not take the leave for those days.

Appellant, in direct contravention of the specific and explicit order of the School Board and fully aware of the consequences of her actions, did not meet with her classes on December 21 and 22, 1981 nor on January 4 through the 15th, 1982. A total of twelve (12) days of unexcused absence was taken. The reason given for her absence was a trip to Spain. No emergency reasons were given.

On January 19, 1982, the Board of Trustees unanimously voted to dismiss Appellant for violating the adopted Board policies GBBA listed as joint exhibit #2, for failing to meet and instruct her assigned classes on the above-described dates and in contravention of the Board's explicit order of December 17, 1981. The Findings of Fact made by the County Superintendent indicated Appellant was given sufficient notice in advance of her departure to fully contemplate her decision. She understood the explicit directions of the School Board and the consequences of her action in the event she chose to disregard the directions of the School Board.

Appellant raises several issues on appeal:

1. The County Superintendent made no finding as to whether the job description was, in fact, "adopted policy of the trustees."
2. The County Superintendent made no finding that Appellant had violated adopted policies of the Trustees.

3. The County Superintendent did not find Respondent had good cause to dismiss Appellant.
4. The School Board failed to consider whether less severe discipline might have been appropriate.
5. The appeal to the County Superintendent was pursuant to Section 20-4-207 MCA. The collective bargaining agreement between the Scobey Education Association and the School Board was not before the County Superintendent and should not have been considered by her.

In the Findings of Fact made by the County Superintendent, the County Superintendent had incorporated by reference several exhibits and other material as outlined in the Findings. A review of the record of this administrative agency hearing includes the following:

a. all pleadings, motions, intermediate rulings;
b. all evidence received or considered, including a stenographic record of oral proceedings when demanded by a party;
c. a statement of matters officially noticed;
d. questions and offers of proof, objections, and rulings thereon;
e. proposed findings of exception;
f. any decision, opinion, or report by the hearing examiner or agency member presiding at the hearing;
g. all staff memoranda or data submitted to the hearing examiners or members of the agency as evidence in connection with their consideration of the case. See Section 2-4-614 MCA and the Rules of School Controversy Section 10.6.117 Administrative Rules of Montana.

The explicit finding made in the record that the job description was in fact an adopted policy of the trustees is stated in subsection 2 of exhibit #1, and it states in part:

> (2) The teacher agrees to comply with the provisions of state law relating to teachings and with all adopted rules, regulations and policies of the Board of Trustees of the School District, which rules, regulations and policies are made a part of this contract by reference...

This State Superintendent has consolidated the remaining issues presented by Appellant into one: Whether the dismissal of Appellant

was proper with regard to adopted Board policy, consideration of less severe discipline, proper procedure and contract law. This State Superintendent has adopted the Standard of Review set out by the Montana Administrative Procedures Act. See Section 2-4-704 MCA and Section 10.6.125 Administrative Rules of Montana.

As was in the case of the Attie Blevins v. Daniels County School District #1, OSPI 20-82, there was no dispute between the parties as to the factual allegations, only a legal dispute as to the authority and the harshness of the discipline imposed. This State Superintendent has rendered two prior decisions on discipline cases pursuant to Section 20-4-207 MCA, See Attie Blevins, OSPI 20-82, dated August 16, 1982, and Noel D. Furlong v. School District No. 5, OSPI 13-81 dated April 13, 1982. In those cases I specifically held that a Board of Trustees may discipline a teacher under Section 20-4-207 MCA for an intentional violation of Board policy or directive. In Furlong the discipline was not upheld because there was a failure to find an intentional violation of Board policy or directive. On the other hand, in Blevins the opposite was true; there was a policy and a directive that were very precise. Blevins was given a definite decision on her request, and that decision was affirmed by the District Superintendent. Despite clear policy and clear directive and a firm decision of the Superintendent and of the Board of Trustees, the Appellant chose to violate that policy. In Blevins, I held:

> This clear policy and clear, intentional, wilfull violation by the teacher in this case, distinguishes it from the Furlong matter and requires that the decision of the County Superintendent be affirmed. See Blevins page 3.

This case is similar to Blevins. Appellant here knew the clear and precise School Board directive and policy with regard to the requested leave. A teacher's contract, a school board policy, joint exhibit #2, as well as the clear directives given in writing by the Superintendent in this matter and the Board of Trustees prior to the actual taking of leave was known to Appellant.

Appellant acknowledges that on December 15, 1981, she had full knowledge and had fully contemplated the decision of the Superintendent and the Board of Trustees stating, "I have decided to put the needs and desires of my family ahead of my job."

The District Superintendent followed up a letter of December 17, 1981 once again requesting that Appellant reconsider her decision and informing her in writing that she would be subject to discipline including dismissal under Section 20-4-207 Montana Codes Annotated and specifically outlined the procedure of what would occur if Appellant chose to take that particular leave. In part the Superintendent stated in the letter:

> "It is, however, my duty to inform you that, should you fail to meet and instruct your class in the location and at any, or all of the times for which you have unsuccessfully requested leave, namely the 21st and 22nd of December 1981, and the 4th through the 8th and the 11th through the 15th of January 1982, I shall recommend to the school board that your employment with Scobey School District #1 be terminated, effective January 19, 1982. Mr. Larry Mahler, Scobey School Board chairman, will call a special meeting of the school board at 8:00 p.m. on January 18, 1982 in order to decide what action should be taken on my recommendation. I will recommend your dismissal based upon your failure, indeed flagrant refusal, to follow the adopted policies of the board by not meeting and instructing your class and by deliberately contravening the reasonable and proper orders of the school administration and the board that you do so meet and instruct your class."

The District Superintendent went on to discuss Appellant's rights with regard to due process in the event she chose to take the leave.

The District Superintendent, after the personal leave was taken, followed up precisely the instructions outlined in the December 17, 1981 letter with regard to his recommendation to the Board of Trustees of dismissal and the clear facts of her wilfully and intentionally violating adopted policies of the board by insubordinately refusing to meet and instruct her third grade class.

The Board of Trustees met, allowed an opportunity for the parties to present evidence, found that there was no emergency authorization or reasons for the leave and pursuant to the provisions of Section 20-4-207 MCA dismissed Appellant. In a clear directive of January 19, 1982 the Chairman of the board stated in a letter to Appellant:

> The board, by its unanimous decision indicated that the charges had been proven, that they considered the violation to be of a sufficient gravity as to merit dismissal. In particular, board members mentioned that: (1) you had already been heard by the board concerning the merits of your application for leave (2) that your appeal had been denied, but that you made no attempt to

seek recourse through the grievance procedure and binding arbitration, (3) that teachers have a right to ask for a leave, but that under the contract the board has full discretion to grant or deny and that the board's decision must be respected, (4) that the youngsters suffered a loss by your untimely and unauthorized absence from the classroom, and (5) that you had made a choice between your job and your family in full recognition of the consequences.

Each one of the exhibits made reference to in this Decision and Order was made a part of and incorporated into the Findings of Fact and the record. The hearing officer concluded on the basis of the record and the findings made that the Board of Trustees acted within the limits of Montana law and the collective bargaining agreement to dismiss Appellant from her teaching position. Appellant left "regardless" of the fair and full warning of the consequences. The Board of Trustees called a special meeting to consider what action to take in the matter and it was their unanimous decision to terminate her employment. The evidence in the record indicates that the School Board fully considered intentional violation, the consequences on the efficiency and operation of the School District and the merits of dismissing this particular teacher under Section 20-4-207 MCA. The Appellant chose to appeal the School Board decision. The hearing officer accepted jurisdiction. The procedure was correctly followed.

Local School Boards must maintain control on the administration of the School Districts' business. They are elected by popular vote and are chosen by reason of their standing in the community, sound judgment, and their interest in the educational development of our young generation. They know and understand the parties and know best the circumstances involved in their School District.

Therefore the Decision of the Hearing Officer is affirmed.

DATED December 29, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

WILLIAM G. HARRIS, Appellant, v. GENEVIEVE BAUER, Superintendent of Schools, Yellowstone County, Montana, Sitting for Sonja Spannring, Superintendent of Schools, Park County, State of Montana and LIVINGSTON SCHOOL DISTRICTS NO. 1 and 4, Livingston, Park County, Montana, Respondents.	DECISION AND ORDER OSPI-15-81

This is an appeal from the Findings of Fact, Conclusions of Law and Order issued by Genevieve Bauer, Hearing Examiner, sitting for Sonja Spannring, County Superintendent of Schools of Park County. The case was submitted on an agreed statement of facts for resolution by the hearing examiner as a matter of law. The hearing examiner considered the stipulated facts, exhibits and written arguments in rendering her final order.

William G. Harris, Appellant, in January, 1973 applied for the position of school psychologist of the Livingston School District. The School District received conditional authorization to employ Appellant. Appellant began the 1973-74 school year as a school psychologist and continued in that capacity until April 15, 1981 when the Board of Trustees voted to terminate his professional services.

On March 20, 1981, Appellant was notified that his performance as a school psychologist was in question and that there would be problems in renewing his contract for the 1981-82 school year. On April 15, 1981, the Board of Trustees voted unanimously to terminate the services of Appellant as school psychologist.

The County Superintendent found that during Appellant's services to the Livingston School District, he was employed as a school psychologist which did not require the duties or responsibilities of a teacher including teaching within the classroom.

Appellant presents the following issue: Was Appellant, while employed in the school district as a school psychologist, a tenured

teacher eligible to the protections of a tenured teacher in the termination of his employment.

The hearing examiner found that Appellant was hired not in the capacity of an instructional, supervisory or administrative staff as a teacher as defined in Section 20-1-101(20). Rather Appellant was hired in the capacity which has now been defined by the 1981 Montana Legislature as a "Specialist." Further, she found that the Montana Teacher Tenure Act Section 20-4-203, did not apply to Appellant and he was not entitled to tenure. It is from these facts and conclusions that Appellant presents his appeal. This case revolves around the definition and purpose:

(1) of a teacher for tenure purposes,

(2) of emergency authorization,

(3) of teacher certification, and

(4) of contract law.

HISTORY

Certification of a "school psychologist" did not occur until 1981. See Section 20-4-106. Prior to the amendment of this statute, a school psychologist was not recognized for any certification purposes by the Board of Public Education. In order to understand certification of a teacher and its important role in the accreditation of public schools in Montana an examination of the statutes is in order. Section 20-4-101 states:

> System of Teacher and Specialist Certification--Student Teacher Exception (1) In order to establish a uniform system of quality education and to ensure the maintenance of professional standards, a system of teacher and specialist certification shall be established and maintained under the provisions of this title and no person shall be permitted to teach in the public schools of the state until he has obtained a teacher certificate or specialist certificate or the district has obtained an emergency authorization of employment from the state...

Section 20-4-102 states:

> Board of Public Education Policies. To effect an orderly and uniform system of teacher and specialist certification, the Board of Public Education shall, upon the recommendation of the Superintendent of Public Instruction and in accordance with the provisions of this title, prescribe and adopt policies for the

issuance of teacher or specialist certificates. Such policy shall provide for:
(1) Reasonable training and experience requirements for teacher, specialist, supervisor, and administrative certificates and endorsements thereon as provided by the certification classification in 20-4-106;
(2) The renewal of teacher or specialist certificates based on the same conditions prescribed for the initial issuance of certificates;
(3) The conduct of hearings on teachers or specialists certification revocation, suspension or denial;
(4) The issuance of the emergency authorization to a district to employ a person who is not the holder of a valid teacher certificate as an instructor of pupils;
(5) Any other policy, not inconsistent with the law, which is necessary for the proper operation of a system of teacher and specialist certification. (emphasis supplied)

The Superintendent of Public Instruction's sole responsibility in certification is to administer the Board of Public Education policies and to make recommendations. See Section 20-4-103. The Superintendent must comply with the provisions and policies adopted by the Board of Public Education. The Superintendent cannot issue teacher certification or emergency authorization to any person who does not satisfy the qualifications and criteria established by the Board of Public Education in its policies for teacher certification, or determine teacher tenure protection without complying with the Standards for Accreditation of Montana Schools. Section 20-4-103 MCA.

Likewise, the Board of Trustees cannot exercise powers or confer upon individuals any status authority unless the law expressly or by necessary implication confers upon them such authority Abshire v. School District #1, 124 Mont. 224, 220 P.2d 1058 (1950).

Teaching certificates are linked to and are a major element of accreditation standards of public schools. Section 20-7-102. Meeting the accreditation standards adopted by the Board of Public Education is a basic requirement for all public schools in this state. This basic quality of education cannot be separated or ignored in determining a component of accreditation as in this case teaching staff. A significant portion of accreditation is a determination of proper teacher certification and assignment to assure the student, parent and the community of a well prepared and competent teacher and staff. See Standards for Accreditation of Montana Schools 3rd ed; 1976, p.1. The applicable Standards for Accreditation of Montana Schools adopted by

Board pursuant to the Administrative Rules of Montana clearly indicates teacher certification is limited to teachers in the classroom setting or one who provides instructional services. School psychologists are ancillary non-teaching personnel, not warranting or requiring certification. Montana Standards provide:

> Teacher certification, as required by Montana statutes, serves a dual purpose. First, certification procedures seek to assure the student, parents and the community of well-prepared teachers. Second, certification standards contribute to the professional growth of teachers by requiring them to continue training through advanced study.
>
> If students are to be able to compete in today's complex society, they must have access to a large body of knowledge and must be able to utilize sophisticated learning techniques. Accreditation standards require that high schools shall employ at least four certified teachers in addition to the principal and superintendent. The standards also require that teachers be assigned on the basis of certificate endorsements and college preparation.
>
> The quality of classroom instruction also is determined by several other factors. To make the best use of a teacher's talents, release time is required to develop lesson plans, to engage in research and to participate in training sessions. The standards, recognizing this need, limit the teaching load for a teacher to 28 hours per week except for one- and two-teacher rural schools.
>
> Qualifications of ancillary personnel--school nurses, social workers, speech therapist, and psychologist--are not outlined in the accreditation standards. It is expected, however, that such personnel be hired on the basis of professional training and experience and knowledge.
>
> Differentiated staffing and other staffing procedures that involve the utilization of teaching personnel to make optimum use of their talents, interests and commitments are encouraged. Differentiated staffing can include utilizing classroom teachers at different levels of training and competency, subject matter specialists, special service personnel, community resource persons and paraprofessionals such as teacher interns and teacher aides. (emphasis supplied) Standards of Accreditation 3rd ed. 1976.

All parties in this appeal failed to define what a school psychologist does and is mandated to do under the Administrative Rules of Montana. The school psychologist is just one of several ancillary support personnel for special education programs.

Section 10.16.1701 specifically requires a teaching certificate with an endorsement in special education prior to allowing any person

to teach in a special education program. Appellant from the record had neither.

The role and responsibilities of a school psychologist are limited to providing a technical but necessary service, "...to administer, score and interpret individual tests of learning aptitude (I.Q.)..." Section 10.16.1704 ARM.

Further Section 10.16.1705 (3) states:

> Persons satisfying these criteria will receive a letter of authority from the office of public instruction to administer, score, and interpret individual tests of learning aptitude and to participate on child study teams as a school psychologist. Their authority to test is contingent upon confining their services to students enrolled in districts in which they are providing services. In no way is this authority to be construed as licensure of psychologists or an endorsement for the private practice of psychology or for contracting directly with parents to test a child or children. This authorization to administer, score, and interpret individual tests will be valid for six years and renewed upon evidence of satisfactory performance. (History: Sec. 20-7-403, MCA; IMP, Secs. 20-7-403(2), 20-7-403 (7), MCA; NEW, 1977 MAR pp. 320-322, Eff. 8/26/77, ARM Pub. 11/26/77.)

School psychologists therefore were not certified as teachers under any capacity by the Board of Public Education nor have they even been recognized as teachers. School psychologists were provided approval by personnel of the Superintendent of Public Instruction pursuant to the initial development of special education in Montana, commencing in 1973 and 1974. See Section 10.16.1704 ARM. This approval of school psychologists had no enforcement responsibilities nor did approval or disapproval of a psychologist affect the accreditation standards of schools. Approval was maintained only to provide a basis or criteria upon which school districts could maintain competent individuals for special education programs. Similar approval was registered with other boards and agencies and professional organizations such as school nurses, and the Board of Nursing, speech therapists, and social workers.

In 1981, the Board issued a "Class 6" certificate. Administrative Rules of Montana 10.57.501 (3) includes the certificate for school psychologists. Today a professional, serving as a school psychologist in the public schools, must be certified with a "spe-

cialist certificate." The 1981 Legislature reaffirmed its intent to disallow teacher status to a psychologist by adopting the "specialist certification" and limiting tenure status only to certified teachers.

Tenure and Teacher

> Teacher is defined by Section 20-1-101 (20) MCA as follows: Definitions. As used in this title, unless the context clearly indicates otherwise, the following definitions apply:
>
> (20) "Teacher" means any person, except a district superintendent, who holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who is employed by a district as a member of its instructional, supervisory, or administrative staff. This definition of a teacher shall also include any person for whom an emergency authorization of employment of such person has been issued under the provisions of 20-4-111. (emphasis supplied)

Appellant contends that the school district chose to employ Appellant as a teacher for each year from 1973. Written contracts were entered describing Appellant as a "teacher." Appellant further argues that in fact he was a certified teacher and registered his certificate with the county superintendent. The issue then becomes, does maintaining and registering a teaching certificate with the county superintendent create in the Appellant teacher status permitting tenure to apply?

Appellant contends:

1. Even though assigned as a school psychologist, he did maintain a teacher's certificate and a registered certificate with the county superintendent.

2. As a result of maintaining his teacher certification, although his exclusive responsibilities were in school psychology, that he should be granted tenure with the district.

An examination of the duties and responsibilities of Appellant is in order. Referring to the stipulation of facts #26 et seq. we find:

> 26. That in January, 1973, Appellant applied for the position of school psychologist with the Livingston School District;
>
> 27. That in 1973 the Livingston School District was granted an emergency authorization to employ Appellant as school psychologist. The Appellant began the 1973-1974 school year as the school psychologist (see respondents exhibit 1);

28. That Appellant commenced work in 1973 under the title "school psychologist," from that date has taken the label "school psychologist" (See respondents exhibits 10-12);

29. That Appellant was labeled elementary counselor on the 1974 report filed with the Office of Public Instruction, (Then Superintendent of Public Instruction). From that time on, with the exception of the 1976-77 school year, Appellant was listed as "school psychologist." (See Appellant's exhibit #E, 1 through E8 which Respondent adopts as Respondent's exhibits 2 through 9);

30. That Appellant was nominated and appointed as school psychologist and director of special education for Livingston School District 1 & 4 March 11, 1975 Board of Trustees meeting. (See respondent's exhibit #14.) On August 19, 1981, the Board of Trustees rescinded the nomination of Appellant for director of special education but left him as school psychologist. (See respondent's exhibit 15);

32. That on April 15, 1981, the Board of Trustees for the Livingston School District voted unanimously to terminate the services of Appellant as school psychologist;

34. That the Office of Public Instruction has recognized Appellant as a school psychologist and continued correspondence as evidence by exhibits L, M, N, O.

Appellant was never a teacher. He maintained certification which is not at the levels or in the areas of his employment and for areas which he was not responsible for. Appellant did not maintain emergency authorization of employment as prescribed by the Board of Public Education as has been argued by Appellant. A conditional approval was obtained by the district from the Office of Public Instruction to allow the services to be performed as a school psychologist.

The Board of Trustees retains the right to assign Appellant for whatever duties and responsibilities of employment are needed by the district. The Board chose to assign Appellant to the position of psychologist and reported such assignment to the Office of Public Instruction on the Annual Fall Reports for Accreditation Review.

> A teacher shall be assigned at the levels and in the subject for which their certificate is endorsed. Standard 220 Standards of Accreditation.

> A non-teaching school employee, like a certificated school employee, does not obtain continuous contract status during his period of employment under a limited contract voluntarily entered into where eligibility for such status did

not exist at the outset of the period covered by the limited contract. Shankle v. Board of Education of Ontario Local School, 54 Ohio App.2d 41, 374 N.E. 2d 648 (1977).

Further, in Champion v. Shoreline School District #42 of King County, 81 Wash. 2d 672, 504 P2d 304 (1972) a school nurse argued that a Washington statute which identified an employee of a school district as a teacher, principal, supervisor or other certificated employee was broad enough to include persons holding a certificate of any kind which are required by the State Board of Education and is not limited to persons holding teaching certificates. The Washington Supreme Court, after an exhaustive review of the statutes and applying the doctrine of "pari materia" and the intent of the legislature, concluded that the nurse was not a certificated employee, but concluded that protections afforded to teachers were extended only to teachers holding valid teacher certificates and performing teacher functions and not to other professions.

Merely maintaining or registering teacher certificates does not create tenure status in the Appellant. Appellant was listed on the annual reports of accreditation to the Office of Public Instruction as a school psychologist. Minutes of the Board of Trustees indicate that Appellant was nominated and appointed as school psychologist and director of special education of the Livingston School District #1 and 4 on March 11, 1975. Appellant was not teaching. The position's duties and responsibilities flowed from the special education provisions for psychologists. The school psychologist was a technical ancillary professional who administered tests and evaluated students and reports and worked with teachers and administrators pursuant to his findings. He was not governed by Standard 201, et seq.

Contract

Appellant further claims that the contract language clearly evidences the status of teacher and by entering into more than three consecutive contracts he gained tenure.

The contract entered into by Appellant and the Board reads in part:

This agreement, made and entered into this 8th day of August 1980

between Livingston School District #1 & 4, Park County, Montana hereinafter referred to as the School District, and William G. Harris hereinafter referred to as the teacher, witnesseth:

(1) That said school district hereby agrees to employ the said teacher to teach, within his or her areas of certificate endorsement, or to render related professional services, as and where assigned by the board of trustees of the Livingston Public Schools for the school year 1980-1981, for a period of 187 teaching days, including pupil instruction-related days (exclusive of legal holidays and vacations).

(4) It is understood that the teacher holds a valid certificate, or will have met the requirements for such by the opening of school. A copy of said certificate showing registration with the Park County Superintendent of Schools shall be filed with the Clerk of the Board of the School District along with an official transcript of all...

(5) In the absence of any previous notice of election or reelection this instrument shall operate as notice of election. Both parties shall comply with the provisions of the applicable state laws, terms and conditions of the negotiated agreement and with the adopted policies of the board of trustees (copies of the agreement and policies have been made available to the teacher) which are made a part of this contract by reference. Request to cancel this contract prior to the opening of school will not be granted when made after July 1, unless specifically approved by the board of trustees. (emphasis supplied)

The contract by its own terms is supplemented with Montana School Law. Both parties failed to follow Montana School Law to determine the content of the contract. Section 20-3-324 states: Powers and duties.

> As prescribed elsewhere in this title, the trustees of each district shall have the power and it shall be their duty to perform the following duties or acts:
>
> (1) employ or dismiss a teacher, principal, or other assistant upon the recommendation of the district superintendent, the county high school principal, or other principal as the board may deem necessary, accepting, or rejecting such recommendation as the trustees shall in their sole discretion determine, in accordance with the provisions of Title 20, chapter 4;
>
> (2) employ and dismiss administrative personnel, clerks, secretaries, teacher aides, custodians, maintenance personnel, school bus drivers, food service personnel, nurses, and any other personnel deemed necessary to carry out the various services of the district;

Section 39-2-101 Employment Defined. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.

Section 39-2-404 Employee Must Obey Employer. Employee must substantially comply with all the directions of his employer concerning the service in which he is engaged, except where such obedience is impossible or unlawful or would impose new and unreasonable burdens on the employee.

Section 39-2-405 Employee Must Conform to Usage. An employee must perform his service in conformity to the usage to the place of performance unless otherwise directed by his employer unless it is impracticable or manifestly injurious to his employee to do so.

Section 39-31-303 Management Rights of Public Employees. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

(1) direct employees;
(2) hire, promote, transfer, assign, and retain employees;
(5) determine the methods, means, job classification, and personnel by which government operations are to be conducted;
(7) establish the methods and processes by which work is performed.

The teacher's contract must be read within the context of all the stipulated facts and Montana Law as incorporated and made a part of the contract by reference. The contract addresses rendering of related professional service. A school district may call an employee by whatever term they choose in their contract. However, under law and the Administrative Rules promulgated by the Board of Public Education, an individual is a teacher only if that person meets certain criteria in rendering or performing the functions that he or she was hired to perform in his or her contracted capacity.

1. Here appellant failed to meet those criteria. He did not perform teaching functions. He was a school psychologist <u>rendering related professional services</u>.

2. Appellant was not assigned to a position for which he was certified by the Board of Public Education.

3. The management rights retained by the Board of Trustees of the particular school district allowed it to assign and retain the employee for the specific purposes in which they needed him and he was to comply with the directions of the Board.

4. From the stipulated facts it is abundantly clear that Appellant was hired on a year-to-year basis to render professional services as a school psychologist.

5. The letter of conditional approval from the Office of Public Instruction permitted Appellant to perform these related professional services within the context of special education.

6. Appellant was termed a school psychologist in the annual report submitted to the Office of Public Instruction which did not require registration of his certificate with the county superintendent because he did not perform or was not assigned those teaching positions from the Board of Trustees.

7. The 1981 Legislature made it clear that the role of the specialist was not the role of a teacher.

8. Teacher tenure laws have been recognized for those individuals who actually perform the important role of teaching. In essence tenure protection lies with the teaching profession; it cannot be treated lightly or allowed to be weakened by other school-related services.

The contract used by respondents is similar to contracts used in dozens, if not hundreds, of locations throughout the state. The contract is all encompassing, used to cover all professional employees of the school district including speech therapists, nurses and psychologists. This was a measure designed to save time and money by the Board of Trustees in securing employment agreements. The contract, although not the best example that can be provided in this instance, must be read within the context of all the facts and in compliance with state law and regulations. Appellant is not a certified teacher for the services performed at Livingston School District nor is any other employee who served in an ancillary, nonteaching, or support staff capacity.

Teacher Retirement System

Finally, Appellant contends that as evidence of his status as a tenure teacher the school district annually contributed to Appellant's account in the Montana Teachers' Retirement Fund as set forth in Section 19-4-101 et seq.

The criteria established for eligibility in the Teachers' Retirement Fund is found in Section 19-4-302. Further, active membership

has been changed and the statute has been amended several times in previous years. According to the stipulated facts Appellant was a teacher in another district prior to applying for the school psychologist position in Livingston. At that time it was mandatory for a teacher of a school district to participate as an active member in the Teachers' Retirement System. The determination of continuation of membership with the Teachers' Retirement System and the administration of the system is the responsibility of the Teachers' Retirement System Board.

The Teachers' Retirement System has expanded its membership to include other ancillary non-teaching personnel. Examples of expanded membership may be found in Section 19-4-101 (20) in the definition of service. Service means the performance of such instructional duties or related activities as would entitle the person to active membership in the Retirement System under the provisions of Section 19-4-302. Section 2.4.302 ARM, permits school nurses to be members of the Teachers' Retirement System. Appellant's argument that being a member of the Teachers' Retirement System insures or provides credible evidence that he maintains tenured status is not sound. The Retirement System and tenure status are not congruent. The intent of the Legislature in the governance of the Teachers' Retirement System and tenured protection addresses different purposes. The appropriate eligibility of Appellant in the Teachers' Retirement System as a school psychologist is beyond the jurisdiction of the State Superintendent and shall not be addressed any further.

Affirmed.

DATED June 7, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF EDDIE ALDEN, JR.,	))	DECISION AND ORDER OSPI 24-82

This is an appeal from the Findings of Fact, Conclusions of Law and Order of the Big Horn County Superintendent of Schools with regard to a special education controversy involving Eddie Alden, Jr. (hereinafter referred to as Appellant). Counsel for both parties have stipulated to waive the time limitation for rendering such Decision and Order within 30 days as provided by Section 121a.512, Code of Federal Regulations.

Appellant was born June 17, 1963. He turned 19 years of age on July 17, 1982. Appellant has a lesion on the left hemisphere of his brain which causes him to suffer a receptive aphasia that prevents him from comprehending what he hears. In other words, he requires cross sensory modality learning. Appellant also has a lesion on the right hemisphere of his brain that prevents him from forming or maintaining interpersonal relationships and causes him to engage in excessive physical aggression towards himself and others.

Appellant is a handicapped child within the meaning of the term under Section 20-7-411 Montana Codes Annotated (hereinafter referred to as M.C.A.).

From the transcript of record, the evidence reveals that Appellant has been placed in several educational institutions in prior years. The Yellowstone Boys Ranch was the first brief residential placement. Later, he was placed at the Intermountain Youth Center in Tucson, Arizona and then at the Jane Waylon School in Phoenix, Arizona. All of these placements lasted for a relatively short period of time.

With the consent of Respondent school district, Appellant was later transferred to the Brown School's Ranch Treatment Center in Austin, Texas. He has been a resident there for approximately three years. School District #1 of Big Horn County (hereinafter referred to as Respondent) had been paying $660.00 per month as its educational

costs for Appellant. The Respondent had shared the cost of education and room and board for Appellant at the Brown's School through an agreement with the Indian Health Services and the Bureau of Indian Affairs and social security supplement. The record discloses that because of financial cutbacks on the federal level, the Indian Health Services and the Bureau of Indian Affairs failed to provide the contract amount for residential placement costs. The Respondent was then requested by the legal guardian of Appellant to pay for his entire placement costs. This request was made pursuant to the Education of the Handicapped Act. 20 U.S.C. Section 1400 eq.

Appellant raises three issues on appeal. This State Superintendent has consolidated the issues as follows:

1. Whether the County Superintendent erred in her conclusions of law that the school district is not liable to pay residential placement costs.
2. Whether the County Superintendent erred and abused her discretion in concluding that Appellant was not entitled to a free appropriate education after his 19th birthday.

Section 20-7-411 MCA states in part:

> Regular classes preferred-obligation to establish special education program. (1) All handicapped children in Montana are entitled to a free appropriate public education provided in the least restrictive alternative setting. To the maximum extent appropriate, handicapped children, including children in public and private insitutions or other care facilities, shall be educated with children who are not handicapped. Separate schooling or other removal of handicapped children from the regular educational environment may occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Federal law also requires payment of room and board expenses when it is necessary for an appropriate educational placement.

> If placement in a public or private residential program is necessary to provide special education and related services, the program, including non-medical care and room and board must be at no cost to the parents of the child. 45 C.F.R. Section 121.302, 20 USC 1412(2)B.

Montana Rules state:

> Room and board expenses must be approved by the Superintendent of Public Instruction. See Section 10.16.2003 ARM.

Counsel for the Respondent presented a case whereby an appropriate placement may be made in the Hardin School District. It appears from the testimony that there may be sufficient services in the Hardin School District to provide Appellant with a free appropriate public education. However, that was not the issue nor the procedure by which such determination could be made. The issue is whether Appellant's placement in the Brown's School was proper and who has financial responsibility.

The record of the hearing below is devoid of any evidence that a placement in the Brown's School was not proper. Indeed, Respondent participated in and consented to the placement.

Appellant has been placed at the Brown's School. Such placement at that time was deemed appropriate by the Child Study Team. From the time of the initial placement, no Child Study Team has recommended a different placement. Once Appellant was placed in this residential program, the Respondent and the other governmental agencies who contracted with the Respondent were responsible for its costs. If Respondent determines that Appellant may be placed in an appropriate special education program, in the least restrictive environment, within the exterior boundaries of the State of Montana, it must follow proper administrative procedure. Such determination must be made by the Child Study Team. To require the Respondent to fund for residential placement, Appellant had to show that the Brown's School was an appropriate placement. The extensive record reveals that such was an appropriate placement. The Respondent also provided evidence showing that appropriate placement may have been made in Hardin, Montana. But to determine whether Appellant should be placed in Montana, a change of placement, requires a Child Study Team recommendation. Section 10.16.903 of the Administrative Rules of Montana (hereinafter referred to as ARM) provides the initial means by which Child Study Team evaluations may determine that a change of educational placement is appropriate and the means by which such change shall occur. Section 10.16.904 ARM provides that a child must continue in the current placement until any potential legal proceeding has been completed.

Section 10.16.1210 ARM provides annual review of the program's appropriateness for the child.

On page 98 of the transcript a question was asked by counsel for the Appellant to a Mr. Steve Smith, Director of Special Education for Hardin School District and the Big Horn Special Education Cooperative;

> Question. At the last child study team, wasn't it the conclusion that Eddie should remain at the Brown's School until something more appropriate could be found, or an appropriate Montana placement could be found?
>
> Answer. I think the idea was that Eddie continue in that placement until we had an opportunity to look at alternative sites for his placement here in Montana, then we would continue with the existing funding pattern. T. p. 200.
>
> Question. Have you found any appropriate Montana placements at this time?
>
> Answer. There might be one pending. Does that count?
>
> Question. Well, is it open right now?
>
> Answer. No, it's not.

Respondent argues that the Respondent had failed to secure the approval for out-of-district placement for the payment of room and board expenses from the State Superintendent of Public Instruction. Because of such failure, Respondent contends Appellant's out-of-state placement was inappropriate. The lack of contact with the Office of Public Instruction by the Respondent cannot relieve the Respondent of its obligation for appropriate placement, but it has relieved the state from the obligation to pay for such placement until the Respondent makes proper application to the state educational agency.

The second issue raised in this appeal is whether the County Superintendent erred and abused her discretion in concluding that Appellant was not entitled to a free appropriate education after his 19th birthday. The County Superintendent in her Conclusions of Law stated:

> 2. 20-7-411 (2) M.C.A. mandates that the district provide Eddie Alden with a free appropriate education until he reaches his 19th birthday, July 17, 1982.

4. There is no evidence in the record from which a finding may be made that the Superintendent of Public Instruction and the trustees of the district ever established a program for handicapped persons between the ages of 0 and 21 years. Therefore, the district is not obligated under 20-7-412 (2)(c) M.C.A. or any state and federal regulations, to provide a special education program for persons between the ages of 0 and 21.

U.S.C. Section 1412 (B) states: "Free and appropriate public education shall be provided to all handicapped children between the ages of 3 and 21." The Federal law states that education of those between 18 and 21 is not required providing the education is not inconsistent with state law. Montana's compulsory enrollment statutes and mandatory special education provision mandate special education for children between ages of 6 to 18 Section 20-4-411(2) MCA. The law does provide the board of trustees the discretionary power to allow special education through age 21. Section 20-7-412(2) MCA.

A state is not required to make a free appropriate education available to a handicapped child in one of these age groups if:

(i) state law expressly prohibits or does not authorize the expenditure of public funds to non-handicapped children in that age group; or

(ii) the requirement is inconsistent with a court order which governs the provision of a free public education to handicapped children in that state. 45 C F R. Section 121a300(b)(5).

Montana allows public funds to be spent on non-handicapped children over age 19. Section 20-5-101(3)(b) MCA.

Federal and state law require that a school district provide free appropriate education to students over age 18 with a particular handicap if it provides services to other students over 18 with that handicap. 45 CFR Section 121a.300. See also Amendment XIV, U.S. Constitution, Section 4, Article II, Montana Constitution 1972. The record shows that the Respondent did provide an education to students with similar handicaps, emotionally disturbed, mentally retarded, speech and language impaired and provides services to students as old as 20 years. See T. p. 184.

Mr. Steve Smith in an answer to a question on the Respondent service of other students said:

> OK. Presently we serve--our last child count that we did, which was in December 15, we were serving approximately 272 children, age anywhere from 6 months to 19 years of age.
>
> We served a variety of handicapped conditions: visually impaired; speech impaired; language impaired; orthopedically impaired; emotionally disturbed; mental retardation. We ran a whole gambit of disorders and handicapped conditions, and also very wide degrees of level of functioning, all the way from very mild to very profound...

The Respondent may choose not to provide educational services for any child past their 18th birthday. Such action must be by formal board policy and must be uniformally applied. It appears from the record that Appellant is entitled to a free appropriate education until his 20th birthday, similar to the services provided to other students in this school district.

The County Superintendent found:

> "a free appropriate education for Eddie Alden includes a special education to be given during normal daily school hours, together with related services...in a home or residential setting... (Conclusions of law.)

The Respondent has not developed an Individual Education Plan (IEP) for Appellant. See T. p. 197. Administrative rules were not followed to provide a change in special education placement. The Child Study Team must be reconvened and a recommendation forthcoming in determining appropriate placement through the Individual Education Plan. See 10.16.903 ARM.

The Montana Supreme Court in B.M. v. State of Montana et al., ___Mont. ___, 649 P.2d 425, 39 St. Rptr. 1285 (1982) has placed the responsibility on school authorities to follow proper procedure in placing a child in special education programs. Such procedures include a Child Study Team review, a development of the Individual Education Program, a recommendation of appropriate placement, and then an opportunity for a hearing if such placement is not believed to be in the least restrictive environment within the school district of Montana.

This case is reversed and remanded to the County Superintendent with instructions to comply with the decision.

DATED November 22, 1982.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

MR. and MRS. WILLIAM WIEDBUSCH, Appellants	)	DECISION AND ORDER
v.	)	
SCHOOL DISTRICT NO. 9, LEWIS AND CLARK COUNTY, MONTANA Respondent.	)	OSPI 25-82

This is an appeal from the findings of facts, conclusions of law and order of the Lewis and Clark County Superintendent of Schools. Parties to this appeal have stipulated to the State Superintendent their waiver of the time limitation of 30 days pursuant to Section 121a.512 Code of Federal Regulations.

The findings of facts issued by the County Superintendent were as follows:

1. Mr. and Mrs. William Wiedbusch reside in School District No. 9, East Helena, and are the parents of T.W.
2. T.W. attended school in District No. 9 from September 1972 until January 5, 1981.
3. T.W. was evaluated by Child Study Teams in District No. 9 in second, third, and fifth grades, and was placed in special education programs.
4. T.W. was eligible for Title I instruction during fourth, fifth, and sixth grades, and received Title I instruction during at least fifth and sixth grades.
5. The parents of T.W. independently removed T.W. from School District No. 9 on January 5, 1981, and placed T.W. in the Helena School system.
6. The parents of T.W. did not seek the recommendation and approval of the resident district Board of Trustees prior to removing T.W. from District No. 9.
7. The parents of T.W. have paid tuition costs to the Helena School system for at least a portion of the time T.W. has been enrolled in Helena, at the rate of one hundred dollars ($100.00) per month.

8. The parents of T.W. filed an appeal before the County Superintendent of Schools requesting the East Helena School District No. 9 pay T.W.'s tuition.
9. All parties agreed, pursuant to a Pre-hearing Order, that the County Superintendent could determine, prior to hearing, whether, under any circumstances, School District No. 9 could be compelled to pay the educational costs of T.W., given the fact that the parents of T.W. independently placed T.W. out-of-district.

The County Superintendent of Schools received extensive and exhaustive briefing from both parties prior to the issuance of the findings of facts, conclusions of law and order. The briefs covered a wide range of issues, relating from financial obligations of the residential school districts in out-of-district placement to free and appropriate public education. Through the mass amounts of briefs filed, the parties entered into a pre-hearing order. Four specific agreed upon facts developed out of the pre-hearing order. Those agreed facts are listed as follows:

1. T.W. is the son of petitioners, Mr. & Mrs. William Wiedbusch, and is an elementary school age child who lives with his parents within School District #9, Lewis & Clark County, Montana.
2. T.W. attended elementary schools operated by the respondent from September, 1972 until January 5, 1981, or from kindergarten until the middle of the seventh grade.
3. T.W. was evaluated by a child study team formed by the respondent in 1976 when he was in the second grade.
4. T.W. was independently removed by his parents from the respondent's school system on or about January 5, 1981, and placed by them in the Helena school system.

The remainder of the findings of fact made by the County Superintendent was found without the benefit of an evidentiary hearing.

This State Superintendent has adopted the Standards of Review of the Montana Administrative Procedures Act. These standards state in part:

Section 2-4-704. Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested.

Because there had been no evidentiary hearing in this case, the agreed facts as stipulated in the pre-hearing order are the only facts that have been established to date and which would have met the standards of review as outlined by the Montana Administrative Procedures Act. Garsjo v. Department of Labor and Industry, 172 Mont. 182, 562 P.2d 473 (1977).

All other facts found by the County Superintendent in this case have not been agreed upon nor is there a record to allow this State Superintendent to determine whether the findings were erroneous in view of the reliable probative and substantial evidence on the whole record. Simply stated, there was no record; therefore there were no issues resolved. It appears that the County Superintendent was troubled in determining the proper legal issues. Once an issue was determined, he failed to allow a proper evidentiary hearing. Appellants have not had their day in court to explain why they took the extreme steps of withdrawing their son from the residential school.

In uncomplicated and straightforward school controversies such an agreed stipulated statement of facts as used here is useful in resolving school controversies and speeding their resolution. Generally speaking, however, matters involving the special education of children are not so easily simplified. Evidence and testimony on the record

with rights to cross-examine and to submit additional evidence and documentation should be required in order to have the issues fairly presented to the County Superintendent and the reviewing authorities. The fact that the County Superintendent permitted this brief stipulated statement of agreed facts to govern his consideration of the case will result now in increased delay, rehearing, reappeal, and extensive duplication of effort by all of those involved. In the future, as a guide for County Superintendents they would be well to hold full evidentiary hearings on the issues presented in order to avoid such waste.

The underlying issue of this entire case at this point in the controversy has been misdirected by the County Superintendent. Appellants raised the issue of whether a residential school district may be held financially responsible for the tuition of a student who was independently and unilaterally placed by his parents in an out-of-district school.

Briefly, the law on special education develops from a tri-level consideration involving a multitude of other issues in a case of this nature. Each level needs independent consideration and affirmation before a consideration of the next level. These levels include:

1. Were the child and the parents or legal guardians of the special education child afforded procedural due process as outlined in both state and federal law. If the parents, legal guardians and child was denied due process, then
2. Was the child provided free and appropriate public education. Free and appropriate education may be provided even though procedural due process may have been violated. The question of financial responsibility still would not be ripe. Public Law 94-142 explicit purpose is to insure that a special education child receives a free and appropriate public education.
3. Not until a parent or legal guardian or child proves that they were denied procedural due process protections and their statutory right to a free and appropriate public education would an inquiry then be warranted to determine whether a school district may be held financially responsible for the independent actions of the parent in unilateral placements.

Appellants admit that state and federal rules are very clear, parents who independently and unilaterally place their child in a school outside of the residential district relieve the residential district of all financial obligations pursuant to Section 10.16.1310 (1) Administrative Rules of Montana.

> 10.16.1310 Out-of-District Services (1) If school district is unable to provide services for its resident handicapped students or unable to provide services through cooperative services, the school district may have to use out-of-district placement. The decision to place a child out-of-district must be recommended by the resident district child study team and approved by the resident district board of trustees. Placement made independently of the public school by the parents and/or other agencies relieves the public school of all financial obligations.

Further, federal and state case law is clear in terms of the unilateral placement by parents and in not holding school districts financially responsible for these unilateral placements. Ruth Anne M. v. Alvin Independence School Dist., (D.C.Tex.), No. G-80-11, Jan. 18, 1982.

This State Superintendent disagrees with Respondent's contention that Section 10.16.1310 automatically ends all inquiry as to whether parents' unilateral placement relieves a school of financial responsibility.

Prior to a determination of whether a school district may be held financially responsible for the unusual and extraordinary action of a parent unilaterally placing a child in an out-of-district placement, initial inquiry must center on issues such as:

1. Whether the parents were afforded due process including their right of notice of their rights, their right to request a hearing within the residential school district if they objected to the placement of the child, being informed of those rights, either actually or by written sign off. Procedural due process in special education laws includes noticing requirements by the school district to the parent and other rights outlined in the special education laws. See OCR complaint finding Juniata, Pennsylvania County School District, Feb. 18, 1982, 257:337 CRR Law Reporter.

2. Whether the parents had exhausted all of their avenues of relief within the district and other considerations, before the decisons to unilaterally remove the child.
3. Whether the parents of the child followed the appropriate and explicit directions of federal and state administrative rules in securing the due process rights for their child.
4. Whether a proper request for a child study team evaluation was made prior to the extraordinary step of unilateral placement.
5. Whether a due process hearing was requested and denied before the parents independently and unilaterally withdrew their child from the residential school district.
6. Whether the parents were involved in the educational determination process of their child in the residential school, were they informed of their rights prior to the individual educational plan meetings and whether they participated in and understood the child study team meetings. Appellants must show that they did not fail to pursue legal procedure as guaranteed to them in the Administrative Rules of Montana or under federal law prior to their action of independent withdrawal and placement of their son in another school district.

The parents admit that they have an extraordinary burden of proof in such hearing.

Independent actions by parents without good reason cannot be condoned under the present special education system. Unilateral placement of children within the exclusive discretion of the parents or legal guardians means a complete loss of control of such situations for residential school districts and unpredictable financial consequences.

The County Superintendent must also make findings of fact basing such findings not on legal briefs but more appropriately on the record as established in the administrative hearing and pursuant to specific directions of Montana Administrative Procedures Act.

Recently the Montana Supreme Court in B.M. v. State of Montana, ____ St. Rptr. ____ (1982), ordered that a district court allow parents their day in court to determine the merits of a case similar

to the one presented here. Although the B.M. case was filed prior to the extensive protections afforded to parents and to children under the present special education laws, the case reflects the Supreme Court's concern for the concept of fairness. This concept of the Court must be followed here. As in B.M., Appellants here must recognize that the burden of proof is on them to show the denial of due process.

Therefore, this case is reversed and remanded back to the County Superintendent of Lewis & Clark County with directions as outlined above.

DATED September 3, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

RALPH FOLLINGLO Petitioner, v. THE BOARD OF TRUSTEES OF CASCADE COUNTY SCHOOL DISTRICT #1 and A Respondent.	)	DECISION AND ORDER OSPI 16-82

This is an appeal by a tenured teacher, Ralph E. Follinglo, of a reduction in force decision (hereinafter referred to as RIF) made by the Cascade County Superintendent of Schools rendered December 19, 1981.

That decision combined the appeals of Ralph Follinglo and Howard Hahn. However, only the decision affecting Mr. Follinglo has been appealed.

At the outset, I believe it is essential to note that the RIF actions of the respondent school district affected many teachers initially. Fortunately, other circumstances allowed many of the teachers to be rehired and only three teachers appealed the county superintendent's orders with respect to them, to me. Since the time of the submission of these appeals, two of the three have become moot because of parallel and decisive actions taken with regard to the teacher's contract rights. I think both the school district and the teachers of Cascade County as well as the county superintendent, have done an excellent job in managing this complex and difficult area of reducing staff in the face of decreasing enrollments.

While Mr. Follinglo is the sole appellant before me, it is necessary and I believe it was necessary for the county superintendent, to consider all teachers within the appellant's group together in order to determine whether or not the RIF was properly applied. In considering the group, I must look to the three teachers in the social studies area, two of whom would have to have been reduced to meet the original RIF needs. The social studies department needed to reduce six FTE's. That was done as follows: D. L. equals 0.4, M. C. equals 1.0, C. F. equals .6, C. B. equals 1.0, A. H. equals 1.0, *R. F. equals 1.0, and *H. H. equals 1.0.

Mr. Owen, another full-time equivalency, was not reduced. He was a non-tenured teacher, and even if he had been reduced, it was argued to the county superintendent and respondent here, that R. F. (Ralph Follinglo) would have had to have been reduced. (See transcript PP 676, 677)

Mr. Follinglo was evaluated by the district according to the RIF criteria and according to that evaluation would have been reduced whether or not Mr. Owen (untenured) would have been reduced. (TR. P 677) Mr. Hahn (tenured) was involved in two extracurricular activities whereas Mr. Follinglo was only involved in one. (TR. P677) The county superintendent properly ruled that only one of the tenured teachers could have been RIF'd.

As we mentioned earlier, both Hahn and Follinglo appealed the school district determinations to the county superintendent whose order requiring the district to choose between Hahn and Follinglo was appealed by Follinglo only, to the state superintendent.

Issue on Appeal:

While both parties in effect are arguing about the remedy imposed by the county superintendent in Mr. Follinglo's case, there are several subissues that arise from this appeal, namely:

a. Whether or not a county superintendent in RIF cases can consider more than one appeal together in rendering a decision.

b. Whether a decision of the county superintendent involving a RIF case can combine or resolve appeals by more than one teacher.

c. Whether or not the county superintendent can remand a RIF decision to the board of trustees for the application or re-application of RIF guidelines.

Early in my consideration of RIF cases, I have stressed and emphasized the importance of dealing with "grouping or dealing with teachers in their subject areas." I have also emphasized the priority that should be given to tenured teachers over non-tenured teachers. See James C. Holter vs. Valley County School District #13, Decision and Order of the State Superintendent, December 30, 1981. Based on these considerations, I think it is not only necessary but in most cases, required, that the county superintendent consider the appeals

of all teachers within one subject area together. Of course, there may be different issues arising out of those appeals that must be handled individually but in matters dealing purely with the application of the RIF criteria, it is proper for the county superintendent as was done in this case, to combine the appeals affecting more than one teacher in a subject area. Of course, this does not limit the rights of the individual teachers to appeal or accept those decisions. In other words, as in this case, one of the teachers may choose to appeal and the other may choose to accept the decision of the county superintendent.

From those threshold determinations, and in applying the standard of review set forth in 2-4-704 MCA, I must reverse the decision of the county superintendent in part, because in this case, there was ample evidence in the record before the county superintendent upon which to render a decision.

Remanding a RIF case back to the board of trustees for a final determination based on their criteria, which have been upheld by the county superintendent or appealed by the teacher, appears to be giving the board of trustees an additional power to terminate, which is not provided for by statute.

In this case, the petitioner was properly notified by the school district as required by statute, and there has been no appeal to me that the other statutory reasons for termination were not followed initially by the school district.

What is argued by the appellant, is the total absence from the statutes of authority for the county superintendent to fashion the additional remedy suggested in this case.

Appellant's attorney has cited the case of Wyatt vs. School District #104, Fergus County, 148 Mont., 83, 417 P2d 221 (1966) in support of their arguments. That case appears to be applicable insofar as it does limit the basis for determination of teachers.

Because the county superintendent upheld the criteria applied by the Cascade District in these RIF cases and because there was ample evidence and record before the county superintendent to determine based on that criteria, which teachers would have been retained and which teachers would have been terminated, by applying it to the specific case in question, there was ample evidence for the county

superintendent to rule. Unfortunately, that was not done and that was in error.

The appellant has carefully tried to update us on the progress of the teachers involved, since the hearings before the board of trustees. Indeed, much has changed, but I believe it is essential to remain confined to the RIF record on appeal, to determine which teachers should have been RIF'd and which teachers should have been retained. Indeed, the school district has the power and control to rehire any RIF teacher as conditions require and indeed, the affidavits attached to the appellant's briefs seem to indicate that has happened. Conditions will change after a RIF and I do not want to limit the flexibility of boards to rehire teachers by basing this decision on what happened after the hearing before the county superintendent of schools.

Admittedly, it is easier for the county superintendent to refer the matter back to the school board, the party who initially instigated the RIF, to make the final determination, but when we have here a complete record from which to make a decision, it is for the county superintendent or for me, to make that uncomfortable decision. Because of the evidence submitted at the county superintendent's hearing, and because there is no dispute as to the guidelines applied by the board of trustees, the determination of Ralph Follinglo, pursuant to RIF by the board of trustees must be upheld and the decision of the county superintendent of schools is reversed insofar as it grants the board the option to terminate one of two tenured teachers.

If this ruling were allowed to stand, the board could use any other criteria for this determination and there is the possibility of a confused and even more complicated appeal process for the teacher involved.

For instance, would the teacher now be able to request a hearing before the board of trustees which would also be appealable to the county superintendent based on the remand decision of the county superintendent. School law is complex enough without further complicating the rights of termination and I believe this is the policy adopted by our Supreme Court in the Wyatt case above and surely Yanzick does not sanction increased complexity for school law appeals.

Therefore, the decision of the county superintendent of schools is reversed insofar as it permits the school district to choose between the appellant and another tenured teacher and the decision of the board of trustees is affirmed insofar as the appellant was terminated pursuant to RIF procedure.

DATED September, 10, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

GAIL HAHN Petitioner, v. THE BOARD OF TRUSTEES OF CASCADE COUNTY SCHOOL DISTRICT #1 and A Respondent.	)	DECISION AND ORDER OSPI 17-81

Pursuant to the oral motion of the attorney for the Appellant to which there has been no objection by the attorney for the Respondent this matter is deemed dismissed as being fully and finally settled on the merits.

DATED September 3, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

JAMES C. HOLTER, Appellant, v. VALLEY COUNTY SCHOOL DISTRICT NO. 13, Respondent.	)	DECISION AND ORDER OSPI 29-82

JAMES C. HOLTER (Appellant) is appealing a reduction in force (RIF) decision of Valley County School District No. 13. In 1981, Appellant sucessfully appealed his RIF to this State Superintendent and was ordered to be reinstated by the School District in early 1982. See Holter v. Valley County School District No. 13, OSPI 7-81. Following that reinstatement, Appellant acted as an elementary physical education teacher, a position for which he was certified, as well as three study hall periods. The record also reflects that Appellant had taught other subjects in his previous four years with the District for which he was not certified.

As in the previous Holter I decision, Section 2-4-704, MCA governs the standard of review which I must apply. See Uniform Rules of School Controversy.

The issues which I must consider relate to the adjustment of Appellant's teaching responsibilities after he was reinstated and the impact of his reassignment of the RIF imposed by the School District.

In Holter I, I recognized the management rights of the School District to be those set forth in Section 39-31-303 MCA which provides in part:

> "Section 39-31-303. Management Rights of Public Employers. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to, . . . (2) hire, promote, transfer, assign and retain employees; ..."

In Irene D. Sorlie v. School District No. 2, Yellowstone County, OSPI 10-81, Decision and Order rendered September 28, 1981, I chose to liberally interpret the definition of "teacher" in order to make the

management rights of School Districts realistic. I hold in this case that the School District was certainly within its rights to assign the teacher to those subjects for which he was certified. From the record, it is abundantly clear that Appellant has on several occasions had the opportunity to gain additional certification but has chosen to put other priorities ahead of certification.

In Holter I, I imposed a strict requirement for the RIF of a tenured teacher. A school district must show a justifiable need for a RIF and cannot RIF a tenured teacher while retaining a nontenured teacher to fill a position for which the tenured teacher was qualified.

In this case, the School District met the burden by showing that no nontenured teacher would exclusively be teaching the subjects which the Appellant taught prior to the RIF. The fact that each elementary teacher would also be teaching P.E. is not a ground for reversal simply because all of the teachers are not tenured.

The School District had experienced declining enrollment, and the decision to decrease its teaching staff pursuant to Section 39-31-303 (3) MCA was proper.

There is also substantial evidence that the RIF policy was applied fairly to Appellant in this instance.

My commitment to give strong support to the concept of tenure remains. However, in this instance, Appellant is attempting to remain in a School District which has suffered a consistent drop in students for a number of years; at the same time the Appellant has not broadened his teaching certification to meet the obvious demand for teachers who have certification in many subjects. No question was ever raised on Appellant's ability to teach or his intelligence. Appellant must consider that if he intends to teach in rural areas, where enrollments are declining, he must broaden his teaching certification in order to be a more useful and valuable employee in a situation where students, teachers and school budgets are under pressure.

Montana's rural schools have consistently maintained a high level of quality. I believe that Appellant's RIF is an unfortunate occurrence in view of his background of experience, but I believe the School District acted in a valid managerial capacity when it eliminated his position. Hopefully Appellant will obtain certification

necessary to be more marketable in the rural areas where he enjoys teaching and living.

Therefore the Decision of the County Superintendent is affirmed.

DATED December 27, 1982.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

CARL ROSENLEAF Petitioner, v. THE BOARD OF TRUSTEES OF CASCADE COUNTY SCHOOL DISTRICT #1 and A Respondent.	)	DECISION AND ORDER OSPI 18-82

Pursuant to the motion of the attorney for the Appellant to which there has been no objection by the attorney for the Respondent this matter is deemed dismissed as being fully and finally settled on the merits.

DATED August 13, 1982.

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